United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

868

No. 17,935

MORRIS A. KENT, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court
for the District of Columbia

INDEX

JOINT APPENDIX

[Filed September 25, 1961]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on August 31, 1961, Sworn in on Spetmeber 5, 1961

THE UNITED STATES OF AMERICA)	Criminal No. 798-61
v.)	Grand Jury No. Original
MORRIS A KENT, JR.)	Violation: 22 D.C.C. 1801, 2901, 2801 (Housebreaking, Robbery, Rape)

The Grand Jury charges:

On or about June 5, 1961, within the District of Columbia, Morris A. Kent Jr. entered the apartment of Juanita A. Echols, with intent to steal property of another.

SECOND COUNT:

On or about June 5, 1961, within the District of Columbia, Morris A. Kent, Jr., by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Juanita A. Echols, property of Juanita A. Echols, of the value of about $13.00, consisting of one wallet of the value of $1.00 and $12.00 in money.

THIRD COUNT:

On or about June 5, 1961, within the District of Columbia, Morris A. Kent, Jr. had carnal knowledge of a female named Juanita A. Echols, forcibly and against her will.

FOURTH COUNT:

On or about June 12, 1961, within the District of Columbia, Morris A. Kent, Jr. entered the apartment of Constance E. Walsh and Gloria J. Palmer, with intent to steal property of another.

FIFTH COUNT:

On or about June 12, 1961, within the District of Columbia, Morris

A. Kent, Jr., by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Gloria J. Palmer, property of Gloria J. Palmer, of the value of about $47.00, consisting of one billfold of the value of $1.00 and $46.00 in money.

SIXTH COUNT:

On or about September 2, 1961, within the District of Columbia, Morris A. Kent, Jr. entered the apartment of Mary L. Murphy, with intent to steal property of another.

SEVENTH COUNT:

On or about September 2, 1961, within the District of Columbia, Morris A. Kent, Jr., by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Mary L. Murphy, property of Mary L. Murphy, of the value of about $13.00, consisting of one wallet of the value of $1.00 and $12.00 in money.

EIGHTH COUNT:

On or about September 2, 1961, within the District of Columbia, Morris A. Kent, Jr. had carnal knowledge of a female named Mary L. Murphy, forcibly and against her will.

/s/ David C. Acheson
Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

* * *

[Filed October 6, 1961]

PLEA OF DEFENDANT

On this 6th day of October, 1961, the defendant Morris A. Kent, Jr., appearing in proper person and by his attorney Richard Arens, being arraigned in open Court upon the indictment, the substance of the charge

being stated to him, pleads not guilty thereto.

The defendant waives the reading of the indictment.

The defendant is remanded to the District Jail.

By direction of

MATTHEW F. MCGUIRE
Presiding Judge
Criminal Court # Assignment

* * * * * *

[Filed October 6, 1961]

PLEA OF DEFENDANT

On this 6th day of October, 1961, the defendant Morris A. Kent, Jr., appearing in proper person and by his attorney Quentin W. Banks, being arraigned in open Court upon the indictment, the same being read to him, pleads not guilty thereto.

The defendant is remanded to the District of Columbia Jail.

The appearance of Quentin W. Banks, Esq. is entered and withdrawn with the approval of the Court and the Court orders that counsel be appointed to represent the defendant.

By direction of

MATTHEW F. MCGUIRE
Presiding Judge
Criminal Court # Assignment

* * * * * *

[Filed October 6, 1961]

MOTION FOR COMMITMENT OF DEFENDANT TO D. C. GENERAL HOSPITAL, PSYCHIATRIC DIVISION

Comes now the Defendant, by his counsel, and moves this Court to enter an order committing him to the D. C. General Hospital, Psychiatric Division, for observation and examination to determine (a) his competency to enter a plea in the above-entitled case and otherwise assist in his own defense, and (b) his mental state as of the time of the crimes charged in the indictment and the causal relationship between such mental state and the alleged crimes.

In support of this motion the Defendant states to this Court that psychiatric examination has shown him to be a victim of severe mental illness.

Defendant further states to this Court that his retention in the company of adults charged with crime is likely to inflict serious mental harm upon the Defendant and to jeopardize the adequacy of the mental examination in his case.

The D. C. General Hospital, Psychiatric Division, is the only one of the two public hospital facilities available to this Court which maintains separate quarters for children and for adolescents and which has specialized in the diagnostic and therapeutic care of children and of adolescents.

Two members of the D. C. General Hospital staff have some familiarity with the case of the Defendant. They have examined the Defendant for the defense. They can, however, be excluded from the conduct of any examination, ordered by this Court.

Defendant, in view of his youth and the capital charges pending against him, asserts the right of receiving the best in available public psychiatric facilities. He asserts this to be essential both to prevent the infliction upon him of serious mental harm as well as to permit the preparation of an adequate defense in the cause of a fair trial.

Psychiatric affidavits are annexed to this motion and are prayed to be read as a part hereof.

Respectfully submitted.

/s/ Richard Arens

* * *

[Certificate of Service]

Counsel for Defendant

[Filed October 6, 1961]

AFFIDAVIT IN SUPPORT OF MOTION FOR COMMITMENT OF DEFENDANT TO D. C. GENERAL HOSPITAL PSYCHIATRIC DIVISION.

Leon Salzman, M.D., being first duly sworn according to law, deposes and says:

(1) I am a duly qualified psychiatrist and psychoanalyst. I am Associate Professor of Clinical Psychiatry at the Georgetown Medical Center; I am a Diplomate of the American Board of Psychiatry and Neurology; I am a Fellow of the American Psychiatric Association; I am a member of the faculty at the Washington School of Psychiatry.

I am also a consultant to St. Elizabeths Hospital and as such participate in the training of the psychiatrists at St. Elizabeths Hospital.

(2) I have examined the defendant, Morris Allen Kent, Jr., on two occasions after his arrest in the instant case.

(3), It is my professional opinion that defendant is a victim of severe mental illness. It is also my professional opinion that defendant should receive speedy psychiatric care in a hospital, specializing in the diagnostic and therapeutic care of children and of adolescents.

(4) It is my professional opinion that the D.C. General Hospital, Psychiatric Division, has facilities for such care, not available to St. Elizabeths Hospital.

(5) It is my professional opinion that confinement of defendant at St. Elizabeths Hospital in company with adult offenders would be harmful to defendant and would render adequate diagnostic procedures difficult.

/s/ Leon Salzman, M.D.

[JURAT: October 3, 1961]

[Certificate of Service]

[Filed October 6, 1961]

AFFIDAVIT IN SUPPORT OF MOTION FOR COMMITMENT OF DEFENDANT TO D. C. GENERAL HOSPITAL, PSYCHIATRIC DIVISION.

Warren Johnson, M.D., being first duly sworn, deposes and says:

(1) I am a duly qualified psychiatrist; I am a Diplomate of the American Board of Psychiatry and Neurology; I am a Fellow of the American Psychiatric Association.

I have served in an executive capacity with the American Psychiatric Association and am familiar with local psychiatric facilities.

I have served as consulting psychiatrist to the Juvenile Court in the District of Columbia and have specialized in the psychiatric care and diagnosis of children and of adolescents.

(2) I have examined the defendant, Morris Allen Kent, Jr., after his arrest.

(3) It is my professional opinion that Morris Allen Kent, Jr., is clearly a victim of mental illness and that he should be hospitalized for observation and examination immediately and that such observation and examination should extend to the determination of his competency to enter a valid plea in his case.

(4) It is my further professional opinion that the confinement of the defendant alongside of adult offenders at the Jail or at Saint Elizabeths Hospital would be deleterious to the defendant and would tend to impede an adequate diagnostic work-up.

(5) It is my further professional opinion that the D.C. General Hospital, Psychiatric Division, is the only one of the two public hospitals available to the Court, equipped with maximum facilities for the diagnostic and therapeutic care of children and of adolescents and providing for the segregation of children and of adolescents from adult offenders.

/s/ Warren Johnson, M.D.

[JURAT: October , 1961]

[Certificate of Service]

[Filed November 16, 1961]

MOTION TO DISMISS INDICTMENT

Comes now the defendant, by his counsel, and moves this Court to dismiss the indictment in this case.

In support of this motion the defendant states to this Court as follows:

The validity of the indictment in this case is founded upon an order of the Juvenile Court entered on September 12, 1961, waiving jurisdiction over the defendant and remitting him for trial for alleged offenses "under the regular procedure of the United States District Court for the District of Columbia."

The order of the Juvenile Court is invalid and hence incapable of conferring jurisdiction upon this Court under the regular procedure governing the trial of adults.

In brief, the Juvenile Court order waiving jurisdiction was entered in violation of D. C. Code §11-914 (1951) and of the due process clause of the Fifth Amendment of the Constitution and of the Sixth Amendment of the Constitution providing for the right of effective assistance of counsel.

Waiver of jurisdiction by the Juvenile Court is possible only after a "full investigation." D. C. Code §11-914 (1951). Such a full investigation has been denied to the defendant. Moreover, the waiver of jurisdiction by the Juvenile Court was entered under circumstances violative of the defendant's rights to due process and the effective assistance of counsel. These violations, even when considered aside from the failure to satisfy the statutory condition precedent to a waiver by the Juvenile Court, viz., a full investigation, taint all subsequent proceedings and render a fair disposition of defendant under adult procedures an impossibility.

The facts of this case can be briefly stated. They are borne out by affidavits which are annexed hereto and prayed to be read as a part hereof. Defendant, Morris Allen Kent, Jr., is a youth who has just turned 17. At the time of the events in this case the defendant had not yet turned 17 and had been a probationer of the Juvenile Court, subject to its care for

two years. Defendant was arrested in the afternoon of Tuesday, September 5, 1961, and taken to police headquarters, where he was kept until 10:00 p.m. Defendant was intensively interrogated throughout this period. He was not informed, either then or at any time thereafter, of his right to remain silent or to have counsel. At 11:30 p.m., defendant was brought to the Receiving Home for Children and there placed in solitary confinement. Defendant passed a sleepless night. Early the next morning the Receiving Home released defendant for further police interrogation at police headquarters. He was unremittingly interrogated from 10:00 a.m. until 5:00 p.m. The basis for interrogation was written complaints alleging defendant's commission of numerous offenses constituting felonies, including rape.

Defendant was held without arraignment for almost a full week at the Receiving Home. During that period a psychiatrist retained by defendant was at one time refused admission by the Receiving Home. This ban, however, was subsequently revoked -- too late, however, for the psychiatrist to see his patient that day. It is noteworthy that the police encountered no comparable bar in their access to the defendant at the Receiving Home.

It is critical, moreover, that when a child is arrested his custody is under the plenary control of the Juvenile Court. D.C. Code §11-912 (Supp. VIII, 1960). [1/] Despite this plenary control, upon defendant's

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[1/] "Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the court, accept the written promise of the parent, guardian, or custodian to bring the child to the court at a time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Public Welfare, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court.

"In the case of any child whose custody has been assumed by the court and pending the final disposition of the case, the child may be released in the custody of a parent, guardian, or custodian, [cont'd. on next page]

arrest in the afternoon of September 5, 1961, the Juvenile Court suffered defendant's subjection to intensive police interrogation until 10:00 p.m. of that day, and from 10:00 a.m. until 5:00 p.m. the next day, without at any time informing defendant, or causing him to be informed, of his right to remain silent or to have counsel. Had the child been an adult, or had jurisdication already been waived, the inquisition would have been clearly illegal. For an "arrested person" must be taken "without unnecessary delay before the nearest available commissioner" who "shall inform" him "of his right to counsel" and "that he is not required to make a statement and that any statement made by him may be used against him." Fed. R. Crim. Proc., Rule 5(a), (b); Mallory v. United States, 354 U.S. 449.

The requirement is not in terms applicable to a child within the jurisdiction of the Juvenile Court because the proceedings there are non-criminal. Pee v. United States, 107 U.S. App. D.C. 47, 274 F. 2d 556, 559. Yet for the Juvenile Court to permit the inquisition of a child, illegal in the case of an adult, is to put the child in a worse position than he would be in were he an adult. It turns the parens patriae plan of procedure upside down. The protective care which the child is supposed to enjoy while within the jurisdiction of the Juvenile Court is made the occasion for depriving him of rights which he would enjoy were he not

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[cont'd from preceding page] or of a probation officer or other person appointed by the court, to be brought before the court at the time designated. When not released as herein provided, such child, pending the hearing of the case, shall be detained in such place of detention as shall be provided by the Board of Public Welfare, subject to further order of the court.

"Nothing in this chapter shall be construed as forbidding any peace officer, police officer, or probation officer from immediately taking into custody any child who is found violating any law or ordinance, or who is reasonably believed to be a fugitive from his parents or from justice, or whose surroundings are such as to endanger his health, morals, or safety, unless immediate action is taken. In every such case the officer taking the child into custody shall immediately report the fact to the court and the case shall then be proceeded with as provided in this chapter. No such child shall be held in such place of detention for any period longer than five days, excluding Sundays and holidays, unless the judge shall order such child detained for a further period."

within its jurisdiction at all. The resulting discrimination is so obviously invidious as to offend due process of law. 2/

To be sure, any statement made by the child will on objection be excluded from evidence on his trial as an accused in a criminal court. Pee v. United States, 107 U.S. App. D.C. 47, 274 F. 2d 556, 559. But exclusion does not cure the damage. For, even though the statement is not usable in evidence, it may serve to uncover other sources of information and the identity of witnesses by whom the case can be proved without the statement, and under the present state of the law the fruits of the statement are admissible in evidence. 3/ Accordingly, the only fair and legal alternative, where the question of waiver has not yet been resolved in favor of retention of jurisdiction, is for the Juvenile Court either to prohibit police questioning of the child or to permit it only after first informing the child of his right to remain silent and to have counsel. Where, as in this case, the Juvenile Court is actively considering waiver and is obviously strongly disposed to grant it, the child is plainly subjected to an illegal inquisition when at the same time the Juvenile Court suffers police interrogation of the child without informing him of his rights.

The illegal inquisition of defendant is relevant to and an element of lack of "full investigation." For "full investigation" obviously means an inquiry not only into the facts of the alleged offense but also into the question whether the parens patriae plan of procedure is desirable and proper in the particular case." Pee v. United States, 107 U.S. App. D.C. 47, 274 F. 2d 556, 559. Suffering illegal police interrogation strongly evidences excessive concentration upon "the facts of the alleged offense" to the substantial exclusion of "the question whether the parens patriae plan of procedure is desirable and proper in the particular case."

Shortly after 2:00 p.m. on September 6, 1961, during the second day of police interrogation, defendant's mother retained Richard Arens

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2/ Bolling v. Sharpe, 347 U.S. 497.

3/ 20 Am. Jur., Evidence, §402.

as counsel for defendant. Defendant's counsel and his mother, accompanied by another attorney, then promptly on that day conferred with the Social Service Director of the Juvenile Court. The conference lasted no more than five minutes. The Director informed counsel that he could attempt to see the Judge of the Juvenile Court but that he did not think counsel would succeed in obtaining an interview or that such an interview would be useful. The Director further informed counsel that action on the request to waive jurisdiction was expected within a day or two, but that, on counsel's insistence, it would be held up until early the next week to enable counsel to submit a letter from a psychiatrist and a memorandum on the subject of defendant's mental health. The Director added, however, that he questioned the usefulness of any psychiatric information at that stage in view of the data already in his possession. The impression left with both attorneys was that the Director believed that counsel was wasting his time in addressing himself to the subject of why jurisdiction should not be waived. Nevertheless, the letter and memorandum were thereafter promptly sent to the Juvenile Court.

Although defendant was at the time of the conference in the custody of the police undergoing interrogation, counsel was not informed that defendant had been released for police questioning, or that he could be found in any place other than the Receiving Home. In fact, during that conference, counsel was handed a brochure providing directions as to how to reach the Receiving Home.

The Juvenile Court refused to grant a motion made by defendant's counsel to direct the authorities of the Receiving Home for Children to refuse to turn defendant over to the police for further interrogation. A formal objection to the treatment of the defendant was left unanswered.

Other than the five minutes spent in conference with the Director of Social Service, defendant's mother was not interviewed by officials of the Juvenile Court. Defendant's father was never contacted by the Juvenile Court at any time. The Rev. Martin Davis, the Principal of the Mackin High School, the school attended by defendant, informed defendant's counsel that he had at no time been contacted by authorities of the Juvenile

Court either before or after defendant's arrest. Neither had any member of his staff, notwithstanding the fact that the Mackin High School possesses significant information highlighting defendant's difficulties in adjusting to ordinary school discipline and otherwise bearing upon the subject of defendant's mental health. Defendant's guidance counselor at the school informed counsel that in view of defendant's behavior while in school, he believed defendant to have required psychiatric treatment. Members of defendant's family informed counsel that defendant had never been adequately toilet trained and that incontinence constituted one of his problems up to the time of his arrest. Finally, while defendant himself was seen and talked with by an official of the Juvenile Court, the interview was conducted during what appeared to be an intermission in police interrogation.

Before the Juvenile Court, defendant offered to prove, through appropriate expert testimony, that he was and had been mentally ill for a considerable period of time; that his mental illness had been neglected by the authorities of the Juvenile Court, and that, given adequate treatment in a hospital setting, he was a fit subject for rehabilitation under the aegis of the Juvenile Court. During the period of defendant's detention at the Receiving Home for almost a full week, defendant was at the instance of his counsel examined by two psychiatrists and one psychologist. An uncontroverted affidavit of one of the psychiatrists was submitted to the Juvenile Court, informing the Court that:

> It is my professional opinion that the respondent [defendant] is a victim of severe psychopathology and that a complete investigation of the psychological and social factors of his case is impossible without placing him in a hospital situation for psychiatric observation.

Defendant at that time moved the Juvenile Court (1) to "transfer .... [defendant] immediately to the D. C. General Hospital Psychiatric Division for appropriate psychiatric observation," (2) to "disclose its Social Service File to .....[defendant's] counsel," and (3) to hold "a hearing ..... immediately after the termination of the period of hospitalization, if waiver of jurisdiction of this case [was] .... contemplated, as

a condition precedent to any valid waiver." Defendant informed the Juvenile Court that "adequate psychiatric facilities in the handling of ... [defendant were] available to the Juvenile Court in the D.C. General Hospital, which has an in-patient department specializing in the care of children and of adolescents." Defendant's counsel pointed out that "the Social Service file should be made available" to him; that without it he was unable "to study the data upon which a judicial decision as to waiver will be based"; and if he was "denied access to the Social Service file and, particularly, to the psychological test results, which, if disclosed, he ....[intended] to submit to the scrutiny of appropriate experts available to him, ...[defendant would] be denied effective assistance of counsel."

The Juvenile Court never passed upon the motion. Defendant's counsel was never heard upon the motion. Indeed, defendant's counsel was never afforded, during any part of the proceedings, any audience by the judge of the Juvenile Court, either formal or informal, in chambers or in court. Nor did the Juvenile Court request any additional information of the two psychiatrists and the psychologist who had examined defendant, or of defendant's counsel. Instead, without any opinion or other statement of reasons, the Juvenile Court, on September 12, 1961, entered an order stating that, "after full investigation, I do hereby waive jurisdiction over the following offenses, which would amount to felonies if committed by an adult, charged against MORRIS ALLEN KENT, JR., born October 20, 1944, of 1823 S. Street, N.W., in the District of Columbia .....[enumerating the charges], and I do hereby order said child held for trial for such offenses under the regular procedure of the U.S. District Court for the District of Columbia."

Accordingly, the waiver of jurisdiction by the Juvenile Court is a nullity because not preceded by the "full investigation" which is the condition precedent to waiver, and because defendant was denied due process and the effective assistance of counsel under circumstances which taint all subsequent proceedings.

In sum, the Juvenile Court failed to make a careful inquiry into the child's mental health; the child, parents, family and school authorities either were not interviewed at all or else interviewed only cursorily; the Juvenile Court did not disclose the Social Service records to the child's counsel although it was under a statutory mandate to do so; there was no disclosure to defendant's counsel of the considerations impelling it to give favorable consideration to waiver of jurisdiction and accordingly defendant's counsel was unable to contest, explain, or refute; finally, the defendant while illegally detained under the jurisdiction of the Juvenile Court was subjected to an unconstitutional inquisition, the indirect products of which are admissible in the District Court under present law and hence depriving that defendant of effective assistance of counsel, albeit at an early stage, and putting him in a position of invidious discrimination as compared to the adult defendant -- all under circumstances which taint all subsequent proceedings.

Accordingly, the indictment in the instant case should be dismissed and the case remanded to the Juvenile Court unless this Court wishes to assume jurisdiction as a Juvenile Court in this case.

One of the affidavits annexed hereto all of which are prayed to be read as a part hereof sets forth the professional psychiatric opinion that the defendant's mental illness is most likely to be susceptible to therapeutic efforts in the rehabilitative setting of a hospital specializing in the care of children and of adolescents, i.e., under the auspices of a Juvenile Court.

/s/ Richard Arens

* * *

Counsel for Defendant.

[Certificate of Service]

[Filed November 16, 1961]

MOTION TO SUPPRESS STATEMENTS OBTAINED FROM THE DEFENDANT BY THE POLICE AS WELL AS ANY EVIDENCE SECURED AS A RESULT OF LEADS FURNISHED BY SUCH STATEMENTS.

Comes now the defendant, by his counsel, and moves this Court to suppress all statements secured from the defendant by the police.

In support of this motion the defendant states to this Court that whatever statements may have been obtained from him by the police were involuntary and were obtained, moreover, during a period of illegal detention. Defendant invites the attention of this Court to the fact that he was detained by the police and the Receiving Home for Children for a period of almost one week after his arrest without arraignment. Cf. Mallory v. United States, 354 U.S. 449.

Defendant further moves for the suppression of all evidence secured as a result of leads furnished by statements obtained in the manner indicated above. To permit the inquisition of a child under the aegis of Juvenile Court in a manner which would be intolerable under the aegis of the District Court is to put the child in a worse position than he would be in, were he an adult. The protective care which the child is supposed to enjoy while within the jurisdiction of the Juvenile Court cannot be made the occasion of depriving him of rights which he would enjoy were he not within its jurisdiction at all. The resulting discrimination is so obviously invidious as to offend due process of law. Bolling v. Sharpe, 347 U.S. 497.

Defendant is unable to provide an itemized list of evidence which should be subject to suppression as the fruit of the illegal practices of the police under the circumstances described above. He submits the requirements of Rule 41(e), F.R.Cr.P. as to itemization of evidence subject to suppression should not be held to be incumbent upon him under these circumstances and that the Government, as the repository of such evidence, should furnish a list of it to make suppression thereof feasible.

Barring the relief prayed for a fair trial will be denied to the

defendant in this case and due process will be denied.

Respectfully submitted,

/s/ Richard Arens

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Counsel for Defendant

[Certificate of Service]

[Filed December 28, 1961]

MOTION FOR PROCUREMENT OF PHOTOSTATIC COPIES OF DEFENDANT'S HOSPITAL RECORDS AT THE D.C. GENERAL HOSPITAL

Comes now the defendant, by his counsel, and moves this Court to direct the D.C. General Hospital to furnish to said counsel a complete set of photostatic copies of all of the hospital records of defendant up to and including the expiration of the time set for the current mental examination by this Court.

In support of this motion, the defendant represents to this Court that his anticipated defense to the charges now pending against him is insanity.

Accordingly, a careful and protracted study of such records in advance of trial is believed essential both to secure the effective assistance of counsel and to assure defendant of a fair trial by making available to him independent psychiatric verification of the results furnished by the D. C. General Hospital.

Although defendant is indigent, the expenses of the photostating can be defrayed by funds available to the defendant's counsel.

Respectfully submitted,

/s/ Richard Arens

* * *

Counsel for Defendant

[Filed January 4, 1962]

GOVERNMENT'S OBJECTION TO THE REPORT OF THE DISTRICT OF COLUMBIA GENERAL HOSPITAL AND GOVERNMENT'S REQUEST FOR A HEARING AND FOR A JUDICIAL DETERMINATION OF THE COMPETENCY OF THE DEFENDANT TO STAND TRIAL

Comes now the United States of America by and through David C. Acheson, United States Attorney in and for the District of Columbia, and Joseph A. Lowther, Assistant United States Attorney, and respectfully represents to the Court as follows:

1. That the defendant in this case stands indicted in a multi-count indictment charging him with the crimes of rape, robbery and housebreaking.

2. That on October 17, 1961, upon motion by counsel for the defendant, the defendant was committed to the District of Columbia General Hospital for a period of sixty (60) days by order of this Court.

3. That in the order of this Court dated October 17, 1961, the District of Columbia General Hospital was ordered to submit a report to the Court indicating therein whether the defendant is presently competent to stand trial and understand the proceedings against him and to properly assist in the preparation of his defense and also whether the defendant at the time of the alleged criminal offenses on June 5, 12 and September 2, 1961, was suffering from any mental disease or defect and whether or not the alleged offenses were the product of such disorder.

4. That in the order of the Court dated October 17, 1961, it was also ordered that psychiatrists and psychologists of both the Government's and the defendant's selection were to be allowed to examine the defendant in said hospital.

5. That by letter dated December 20, 1961, the Chief Psychiatrist of the District of Columbia General Hospital informed the Clerk of this Court that "in view of the many facets of his (meaning the defendant's) behavior we feel that he (meaning the defendant) is incompetent to stand trial and to participate in a mature way in his own defense".

6. That pursuant to the provisions of Title 24, Section 301(a) of the

District of Columbia Code, 1961 Edition, the Government objects to the Chief Psychiatrist's finding of incompetency of the defendant to stand trial.

7. That pursuant to the provisions of Title 24, Section 301(a) of the District of Columbia Code, 1961 Edition, the Government requests that the Court conduct a hearing and make a judicial determination of the competency of the accused to stand trial.

/s/ DAVID C. ACHESON
United States Attorney

/s/ JOSEPH A. LOWTHER
Assistant United States Attorney

[Certificate of Service]

[Filed April 10, 1962]

MOTION FOR HEARING TO DETERMINE THE DEFENDANT'S COMPETENCY TO STAND TRIAL

Comes now the defendant, by his counsel, and moves this Court for a hearing to determine the defendant's competency to understand the nature of the proceedings against him and to consult properly with counsel in his defense.

In support of this motion, the defendant states to this Court as follows:

(1) The District of Columbia General Hospital, Psychiatric Division, certified to this Court that defendant was not competent to participate in his own defense. The Government at that time filed an objection to the D. C. General Hospital report and requested a hearing. At that time action upon the Government's motion was deferred pending a report from St. Elizabeth's Hospital to which defendant was committed for a new mental examination.

(2) St. Elizabeth's Hospital has certified to this Court that defendant, although suffering from Schizophrenic Reaction, Chronic Undifferentiated Type, is competent to understand the nature of the proceedings against him and to consult properly with counsel in his defense.

(3) Counsel has found defendant at times apparently alert and co-operative, and at other times disoriented and incapable of maintaining rational communication. The last time counsel saw defendant at St. Elizabeth's Hospital, defendant appeared unable to maintain any rational communication on the subject of the charges pending against him.

WHEREFORE, it is prayed that a hearing be held before trial at which this Court can make a judicial determination as to the defendant's competency to understand the nature of the proceedings against him and to consult properly with counsel in his own defense.

Respectfully submitted,

Richard Arens
Counsel for Defendant
2000 "P" Street, N.W.
Washington 6, D. C.

[Certificate of Service]

[Filed November 23, 1962]

OBJECTION TO TREATMENT OF DEFENDANT BY DISTRICT JAIL AUTHORITIES AND TO INTERFERENCE WITH EFFECTIVE ASSISTANCE OF COUNSEL BY REFUSING ACCESS TO DEFENDANT BY PSYCHIATRISTS SELECTED FOR HIM BY HIS COUNSEL

Comes now the defendant by his counsel and objects to the treatment accorded him by the District Jail authorities as well as the interference by said authorities with effective assistance of counsel to which defendant is entitled under the Constitution.

In support of this objection defendant states to this Court that a duly qualified psychiatrist retained by the defense was refused admission to the District of Columbia Jail to conduct an examination of the defendant on an occasion approximately a year ago.

Moreover, during the last week, when Dr. Warren C. Johnson was asked by defendant's counsel to bring his medical findings concerning the defendant up to date by renewed mental examination, he was informed by telephone that he would not be admitted to the District Jail by the Jail

authorities for that purpose.

An affidavit by Dr. Warren C. Johnson is annexed hereto and is prayed to be considered a part hereof.

It is the belief of defendant's counsel that this interference with the preparation of the medical phase of the case violates the Fifth and Sixth Amendments to the Constitution and that defendant's counsel is, as a consequence, handicapped in the effective presentation of an adequate defense, if and when the Court of Appeals should rule that the District Court has valid jurisdiction over this case.

Defendant also invites the attention of the Court to the fact that he has on several occasions been placed in solitary confinement at the District Jail. He submits, in the light of existing mental illness certified to by both St. Elizabeth's and D. C. General Hospital, that under these circumstances, i.e., his mental state, this constitutes cruel and unusual punishment and is hence a violation of the Eighth Amendment to the Constitution.

Respectfully submitted,

/s/ RICHARD ARENS

* * *

[Certificate of Service]

AFFIDAVIT BY DR. WARREN C. JOHNSON

Warren C. Johnson, M.D., being first duly sworn, deposes and says:

1. I am a duly qualified physician in the District of Columbia; I am a Diplomate of the American Board of Psychiatry and Neurology and a Fellow of the American Psychiatric Association; I am engaged in the full-time practice of psychiatry and have specialized in the diagnosis and treatment of children and adolescents.

2. Within a period of the last seven days or so I attempted to secure access to the District of Columbia Jail to make an examination of defendant at the request of his counsel. I was told over the telephone that I would not be admitted.

/s/ WARREN C. JOHNSON, M.D.

[JURAT dated November 23, 1962]

[Filed February 8, 1963]

THE JUVENILE COURT OF THE DISTRICT OF COLUMBIA
FOURTH AND E STREETS, N. W.
ORMAN W. KETCHAM
JUDGE

By the authority vested in me under Section 13 of the Juvenile Court Act of the District of Columbia of June 1, 1938, 52 Stat. 599, Ch. 309, as amended, and after full investigation, I do hereby waive jurisdiction over the following offenses, which would amount to felonies if committed by an adult, charged against MORRIS ALLEN KENT, Jr., born October 20, 1944, of 1823 S Street, N. W., in the District of Columbia,

(a) Housebreaking: Date of offense - on or about March 5, 1961, in the vicinity of 2138 California Street, N. W., Apartment #114

(b) Assault with intent to commit rape: Date of offense - on or about March 5, 1961, in the vicinity of 2138 California Street, N. W., Apartment #114
Complainant: Rebina Ruth Alai.

(c) Housebreaking: Date of offense - on or about April 16, 1961, in the vicinity of 1325 New Hampshire Avenue, N.W., Apartment #4

(d) Assault (Sex): Date of offense - on or about April 16, 1961, in the vicinity of 1325 New Hampshire Avenue, N. W., Apartment #4
Complainant: Margaret Louise Goldsworthy.

(e) Housebreaking: Date of offense - on or about May 7, 1961, in the vicinity of 1729 19th Street, N. W.

(f) Assault with intent to commit rape: Date of offense - on or about May 7, 1961, in the vicinity of 1729 19th Street, N. W.
Complainant: Elizabeth Brache.

(g) Housebreaking: Date of offense - on or about June 5, 1961, in the vicinity of 2153 California Street, N. W., Apartment #508

(h) Rape: Date of offense - on or about June 5, 1961, in the vicinity of 2153 California Street, N. W., Apartment # 508
Complainant: Juanita Ann Echels.

(i) Housebreaking: Date of offense - on or about June 12, 1961, in the vicinity of 1311 30th Street, N. W., Apartment #303

(j) Assault (Sex): Date of offense - on or about June 12, 1961, in the vicinity of 1311 30th Street, N. W., Apartment #303 Complainant: Constance Walsh.

(k) Housebreaking: Date of offense - on or about July 8, 1961, in the vicinity of 2627 Adams Mill Road, N. W., Apartment #106

(l) Rape: Date of offense - on or about July 8, 1961, in the vicinity of 2627 Adams Mill Road, N. W., Apartment #106 Complainant: Jina Herbert.

(m) Housebreaking: Date of offense - on or about September 2, 1961, in the vicinity of 1717 20th Street, N. W., Apartment #307

(n) Rape: Date of offense - on or about September 2, 1961, in the vicinity of 1717 20th Street, N. W., Apartment #307 Complainant: Mary L. Murphy.

(o) And/or any other offenses, arising out of the acts or transactions set forth in (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m) and (n) above,

and I do hereby order said child held for trial for such offenses under the regular procedure of the U. S. District Court for the District of Columbia.

Dated this 12th Day of September, 1961, at Washington, D. C.

/s/ Orman W. Ketcham
Judge

[Filed February 15, 1963]

MOTION FOR PAYMENT OF DEFENSE WITNESSES AT GOVERNMENT EXPENSE

Comes now the defendant, Morris Allen Kent, Jr. and moves this Honorable Court for an order allowing payment of expert witness fees for certain physicians to testify in the above captioned cause and for payment of their expenses including travel expenses to the District of Columbia, and lodging while in the District of Columbia, for purposes of testifying at the trial, and for the travel expenses and lodging for certain lay witnesses in the above captioned case, and as grounds therefor states as follows:

1. That he is indigent and unable to pay for the testimony of said witnesses to be introduced into trial.

2. That said witnesses are indispensable to him to present adequately his insanity defense in this case in which he is charged on a multi-count indictment with rape, housebreaking and robbery and where there is a possibility of the death sentence; that all of said doctors have examined Morris Allen Kent, Jr. and have relevant information concerning his insanity defense. Dr. Charles E. Goshen, has examined the defendant and has evidence concerning the defendant's mental disease. Dr. Goshen, whose affidavit is attached hereto, is of the opinion that the defendant was suffering from a mental disease or disorder at the time of the alleged act set forth in this indictment and is of the opinion that said acts, if committed by the defendant, were the product of said mental disease or defect. Dr. Goshen presently is in the Department of Psychiatry at the Medical Center of West Virginia University, Morgantown, West Virginia. His affidavit states that he is unable to be present to testify in the District of Columbia unless his expenses can be paid and he can be paid a reasonable fee for his time. Dr. Warren C. Johnson of 2025 Eye Street, N. W., Washington, D. C. has examined the defendant. In his Affidavit attached hereto, and prayed to be read as a part of this Motion and incorporated by reference, he states that he is of the opinion that at the time of the alleged acts covered in the indictment the defendant was suffering from

a mental disease or disorder and further, that the acts, if committed by the defendant, were the product of said mental disease and disorder. Dr. Johnson, a psychiatrist practicing in the District of Columbia, has stated through his Affidavit that he expects to be paid in this matter.

Father Martin Davis and Father Aquinas Novak were instructors of the defendant in a parochial school in the District of Columbia. They have information and opinions as lay witnesses as to the defendant's mental condition. At the present time, both individuals are teaching at St. Paul College at 500 Prospect Avenue, East Waukesha, Wisconsin, and have indicated that they will be unable to come to the District of Columbia to testify as defense witnesses in the above cause unless provisions are made for their transportation expenses from Wisconsin to Washington, D. C. and for their return trip.

The defendant submits that he will be unable to adequately present his defense and will forfeit evidence essential to the insanity defense and hence to a fair trial unless he can have the presence and testimony of the out of town witnesses at Government expense and have the Court's order to the Government to pay the transportation expenses of the out of town witnesses as well as a reasonable fee for the attendance in Court and testimony of the defense psychiatrists, Drs. Charles E. Goshen and Warren C. Johnson.

Respectfully submitted,

/s/ MARK B. SANDGROUND, ESQ.
Counsel for Defendant

* * *

[Certificate of Service]

[Filed February 18, 1963]

MOTION FOR ISSUANCE OF SUBPOENA

Comes now the defendant in the above-entitled cause, Morris Allen Kent, Jr., and moves the Court to order the issuance of subpoenas on behalf of the defendant for the following named witnesses:

See Attached Schedule "A"

Attorney for Defendant
/s/ MARK. B. SANDGROUND

* * *

Above Motion Granted.

JUDGE

Dated:

[Certificate of Service]

SCHEDULE "A"

LIST OF WITNESSES

1. Dr. Charles E. Goshen
   Department of Psychiatry
   West Virginia University
   Morgantown, West Virginia
2. Dr. Warren C. Johnson
   2025 Eye Street, N. W.
   Washington, D. C.
3. Dr. William J. Novak
4. Dr. James A. Ryan
5. Dr. Bernard I. Levy
   D. C. General Hospital
   19th & C Streets, S. E.
   Washington 3, D. C.
6. Dr. Catherine Beardsley
   St. Elizabeth's Hospital
   Washington, D. C.
7. Dr. John L. Endacott
   7417 Montrose Street
   Alexandria, Virginia

8. Dr. Malcolm L. Meltzer
VA Hospital
Fullon St. & Irwin Road
Durham, North Carolina

9. Father Martin Davis
10. Father Aquinas Novak
Mt. St. Paul College
500 Prospect Avenue, East
Waukesha, Wisconsin

11. Dr. David Owens
St. Elizabeth's Hospital
Washington, D. C.

12. Dr. Maurice Platkin
St. Elizabeth's Hospital
Washington, D. C.

13. Dr. Dorothy Dobbs
St. Elizabeth's Hospital
Washington, D. C.

14. Dr. William Hamman
St. Elizabeth's Hospital
Washington, D. C.

* * *

[Filed February 18, 1963]

AFFIDAVIT OF MRS. COURTNEY KENT

MRS. COURTNEY KENT, being first duly sworn according to law deposes and says:

1. I am the mother of the defendant, Morris Allen Kent, Jr. I am employed by the United States Government as a clerk with the GS rating of 2.

2. I am supporting my minor daughter, and am separated from my husband. My husband has never regularly contributed to either my support or to the support of my children. I do not have the funds to pay Dr. Charles E. Goshen to come from Morgantown, West Virginia to testify for the defense in my son's case. I further do not have the funds to pay him a reasonable fee for his time spent in Washington. I desire that Dr. Goshen

testify for the defense in this matter. I do not have the funds to adequately to pay Dr. Warren C. Johnson a fee for his time in testifying in this case.

3. I do not have the funds to pay transportation expenses to Washington and back from Waukesha, Wisconsin for Father Martin Davis and Aquinas Novak.

Further your Deponent saith not.

MRS. COURTNEY KENT

[JURAT dated February 1963]

[Filed February 18, 1963]

AFFIDAVIT OF WARREN C. JOHNSON, M.D.

WARREN C. JOHNSON, M.D., being first duly sworn according to law deposes and says:

1. My name is Warren C. Johnson, and I am a physician licensed to practice medicine in the District of Columbia, having offices at 2025 Eye Street, N. W., Washington, D. C. I specialize in psychiatry.

2. I have examined Morris Allen Kent, Jr., the defendant in the cause. Based upon the history of this defendant, and my own personal observations and examinations, I have an opinion concerning his mental condition, which I can state with reasonable medical certainty. It is my opinion that on the dates set forth in the indictment, the defendant, Morris Allen Kent, Jr., was suffering from a mental disease or disorder, i.e. a type of schizophrenia, that the acts set forth in the indictment if committed by the defendant, were the product of this mental disease or defect.

3. I am in the private practice of medicine in the District of Columbia and it would be a great hardship for me to devote considerable time to appearing in Court and testifying for the defense, unless some arrangements could be made to compensate me for my time. I would be unwilling to voluntarily testify in this cause unless some arrangements could be made for reasonable compensation for my actual time devoted to my testimony.

Further your Deponent saith not.

/s/ WARREN C. JOHNSON

[JURAT dated February 15, 1963]

[Filed February 18, 1963]

AFFIDAVIT OF CHARLES E. GOSHEN, M.D.

CHARLES E. GOSHEN, M. D., being first duly sworn according to law, deposes and says:

1. I am Charles E. Goshen, and I am a physician licensed to practice medicine, specializing in psychiatry. At the present time I am employed with the Department of Psychiatry, at the Medical Center, West Virginia University, in Morgantown, West Virginia.

2. Late in 1961, I examined the defendant, Morris Allen Kent, Jr. Based upon the history taken at that examination, and my own observations, I have a professional medical opinion concerning his condition which I can state with reasonable medical certainty. I know that the defendant is charged with rape, housebreaking, and robbery. It is my opinion, that on the date set forth in the indictment, the defendant, Morris Allen Kent, Jr., was suffering from a mental disease or disorder, i.e. a schizophrenic condition and that the acts, if committed by the defendant, were the direct product of this mental disease.

3. At the present time, I am employed in Morgantown, West Virginia and would be unable to come to the District of Columbia to testify at the trial set for March 14, 1963 unless arrangements could be made to pay me for my transportation costs to Washington and return, my expenses while I am in the city, and a reasonable fee for my time devoted to testimony in this cause.

Further your Deponent saith not.

/s/ CHARLES E. GOSHEN

[JURAT dated 1963]

[Filed May 21, 1963]

JUDGMENT AND COMMITMENT

On this 17th day of May, 1963 came the attorney for the government and the defendant appeared in person and by counsel, Mark Sandground, Esq.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of HOUSEBREAKING AND ROBBERY as charged in Counts 1, 2, 4, 5, 6, and 7 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIVE (5) YEARS TO FIFTEEN (15) YEARS ON COUNT 1; FIVE (5) YEARS TO FIFTEEN (15) YEARS ON EACH OF THE COUNTS 2, 4, 5, 6, and 7; SAID SENTENCES BY THE COUNTS TO RUN CONSECUTIVELY AND CONSECUTIVELY WITH THE SENTENCE IMPOSED ON COUNT 1

THE DEFENDANT IS TO BE CREDITED WITH ALL TIME SERVED AS A MENTAL PATIENT IN A MENTAL INSTITUTION AGAINST THE SENTENCES IMPOSED IN THIS CASE

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Edward A. Tamm
United States District Judge.

The Court directs the Probation Officer to request the Attorney General to designate St. Elizabeths Hospital as the place of confinement for this defendant for such period as the defendant is suffering from a mental disease or disorder requiring his hospitalization.

Clerk.

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
For The District of Columbia

No. 17935

MORRIS A. KENT, JR.,

Appellant,

V.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM JUDGMENT OF UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MYRON G. EHRLICH
Attorney for Appellant
(Appointed by this Court)
401 Third Street, N.W.
Washington 1, D.C.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the District Court had jurisdiction of this case where the following circumstances appeared:

(a) The case had been waived by the Juvenile Court which had ascertained shortly in advance of waiver that appellant was a probable victim of mental illness -- although no mental examination or treatment had been accorded to appellant under Juvenile Court auspices, despite the fact that the Juvenile Court had been requested to do so by a relative of the appellant well before the appellant's arrest in instant case; the case was waived by the Juvenile Court inconsistently with its own criteria of waiver as well as under invalid criteria of waiver embodied in Policy Memorandum No. 7;

(b) Appellant had been subjected to illegal detention, interrogation and fingerprinting after his arrest under Juvenile Court auspices;

(c) Appellant had been deprived of effective assistance of counsel during the period of such interrogation and fingerprinting;

(d) The Juvenile Court refused to disclose the social records to child's counsel although it was under a statutory mandate to do so;

(e) The District Court declined to conduct any

manner of hearing concerning the allegations by appellant that while under the jurisdiction of the Juvenile Court he had been deprived of his constitutional rights to due process and effective assistance of counsel and the full investigation to which he was entitled under statute preliminary to waiver;

(f) The District Court summarily denied appellant an opportunity to be heard on his request that it constitute itself a juvenile court;

(g) The District Court failed to make an adequate and fair determination as to the appellant's mental competency to stand trial, after being informed by the D. C. General Hospital psychiatric staff that appellant was mentally incompetent to stand trial.

2. Whether the District Court committed plain error affecting the substantial rights of appellant by admitting into evidence and permitting reference to, and comparisons of, fingerprints taken from appellant by the police while he was under the exclusive jurisdiction of the Juvenile Court, and without authority from that Court?

3. Whether, pretermitting the admissibility of the fingerprints referred to in (2) above, a conviction of robbery and housebreaking could rest upon the discovery of appellant's fingerprints on a table in a room in which the alleged housebreaking had taken place?

4. Whether the District Court erred when it refused

to grant judgment of acquittal on all counts of the indictment, on the ground of insanity, where there was not sufficient competent evidence to prove beyond a reasonable doubt either (1) that the accused had no mental disease or defect or (2) that, although the accused was defective or diseased, the said acts were not the product of such mental disease?

5. Whether in a trial upon an indictment charging two capital and many other felony offenses, plain error affecting the substantial rights of the defendant was committed by the trial court when it gave the jury the so-called "Allen" or "dynamite" charge before the jury retired to consider its verdict?

I N D E X

TABLE OF CASES

STATUTES

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

Morris A. Kent, Jr.,	)	
	)	
Appellant	)	
	)	
Vs.	)	No. 17935
	)	
UNITED STATES OF AMERICA	)	

Appeal From Judgment of United States
District Court for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

Appellant, aged 16 at the time of his arrest, was subject to the jurisdiction of the Juvenile Court which had "original and exclusive jurisdiction" over him. Title 11-907 D. C. Code. The Juvenile Court purported to waive jurisdiction over said appellant. Thereafter, appellant was indicted for violation of Title 22-1801, 2801 and 2901 D. C. Code. Upon conviction on violations of Title 22-1801 and 2901, appellant was permitted to proceed on appeal without prepayment of costs. Jurisdiction is vested in this Court to decide this appeal by virtue of 28 U.S.C. Secs. 1291 and 1294.

STATEMENT OF THE CASE

Appellant was indicted and tried on eight counts in a single indictment. The first three counts alleged that on or about June 5, 1961 he committed housebreaking, robbery, and rape of one Echols in her home; the 4th and 5th counts alleged that on or about June 12, 1961 he committed housebreaking and robbery of one Palmer in her home; the 6th, 7th, and 8th counts alleged that on or about September 2, 1961 he committed housebreaking, robbery, and rape of one Murphy in her home. He was convicted on the three housebreaking and the three robbery counts, and was thereafter sentenced to serve 5 to 15 years on each such count to run consecutively, a total of 30 to 90 years. He was found not guilty by reason of insanity on counts 3 and 8, charging him with rape.

Appellant was a child aged sixteen at the time of his arrest in the instant case, and had theretofore been a probationer of the Juvenile Court and subject to its care for two years. Although "a marked deterioration of (appellant's) personality structure . . . and the possibility of appellant being the victim of mental illness" had been conceded by the Juvenile Court authorities some time after his arrest in instant case, appellant had never been subjected to mental examination nor afforded psychiatric treatment under the auspices of the Juvenile Court.

Appellant was arrested about 3:00 P.M. on September 5, 1961. The basis for his arrest was the use of fingerprints taken by the police when he was 14 years old and a ward of Juvenile Court. Instead of being taken to the Juvenile Court or to the Receiving Home for Children or before a probation officer as required by law[1/], he was taken to police headquarters where he was kept until 10:00 P.M. He was interrogated throughout this period by police officers acting in relays. In the light of the trial transcript, it is clear that this period was also utilized to secure addition fingerprints (Trial Transcript 198).

Sometime after 10:00 P.M. appellant was brought to the Receiving Home for Children and there placed in solitary confinement. He passed a sleepless night. Early the next morning the Receiving Home released him for further police interrogation at police headquarters. He was again unremittingly interrogated by police officers acting in relays.

Shortly after 2:00 P.M. on September 6, 1961, during this period of police interrogation, counsel was retained by appellant's mother. Counsel promptly conferred with the Social Service Director of the Juvenile Court. Although appellant was at the time of the conference in the custody of the police undergoing interrogation, his counsel was not informed that appellant could be found in any place

1/ D. C. Code Sec. 11-912 (Supp. VIII, 1960).

other than the Receiving Home for Children. In point of fact, during that conference, counsel was handed a brochure providing directions as to how to reach the Receiving Home.

Only during what appeared to be an intermission in police interrogation, appellant was seen and briefly talked with by an official of the Juvenile Court.

The Juvenile Court subsequently declined to grant a motion made by appellant's counsel to direct the authorities of the Receiving Home for Children to refuse to turn defendant over to the police for further interrogation. A formal objection to the treatment of the defendant was left unanswered.

Preliminary to waiver, officials of the Juvenile Court did not confer with appellant's mother for more than five minutes. Appellant's father was not contacted by the Juvenile Court at any time. The Rev. Martin Davis, the Principal of Mackin High School, the school attended by appellant, also was not contacted by the authorities of the Juvenile Court either before or after appellant's arrest. Nor was any member of his staff.[2/]

During the period of appellant's detention at the

2/ The affidavits annexed to the motion to dismiss the indictment, show that minimal contact had been maintained by Juvenile Court officials with appellant's mother prior to appellant's arrest in the instant case and that the mother had never had an opportunity to communicate what she knew about appellant's bizarre behavior and incontinence.

Receiving Home without any manner of arraignment for almost a full week, appellant was at the instance of his counsel examined by psychiatrists. Unlike the police who encountered no bar in securing access to appellant, one of the psychiatrists was first refused admission to the Receiving Home; access was later granted to him but too late for him to see appellant that day.

Before the Juvenile Court, appellant offered to prove, through appropriate expert testimony, that he was and had been mentally ill for a considerable period of time; that his mental illness had been neglected by the authorities of the Juvenile Court; and that, given adequate treatment in a hospital setting, he was a fit subject for rehabilitation under the aegis of the Juvenile Court.

An uncontroverted affidavit of one of the psychiatrists submitted to the Juvenile Court in support of the motion, informed the Court:

> "It is my professional opinion that the respondent (defendant) is a victim of severe psychopathology and that a complete investigation of the psychological and social factors of his case is impossible without placing him in a hospital situation for psychiatric observation."

That psychiatrist further offered to recommend a treatment situation to the Juvenile Court which would permit the continued handling of appellant by the Juvenile Court without endangering the public. The Juvenile Court, however, sought no information from that psychiatrist.

Appellant at that time moved the Juvenile Court (1) to "transfer . . . (appellant) immediately to the D. C. General Hospital Psychiatric Division for appropriate psychiatric observation," (2) to "disclose its Social Service File to . . . (appellant's) counsel," and (3) to hold " a hearing . . . immediately after the termination of the period of hospitalization, if waiver of jurisdiction of this case (was) . . . contemplated, as a condition precedent to any valid waiver." Appellant informed the Juvenile Court that "adequate psychiatric facilities in the handling of . . . (appellant were) available to the Juvenile Court in the D. C. General Hospital, which has an inpatient department specializing in the care of children and of adolescents." Appellant's counsel pointed out that "the Social Service file should be made available" to him; that without it he was unable "to study the data upon which a judicial decision as to waiver will be based"; and that if he was "denied access to the Social Service file and, particularly, to the psychological test results, which, if disclosed, he . . . (intended) to submit to the scrutiny of appropriate experts available to him, . . . (appellant would) be denied effective assistance of counsel."

The Juvenile Court never passed upon the motion. Appellant's counsel was never heard upon the motion. Indeed, appellant's counsel was never afforded, during any part of the proceedings, any audience by the judge of the Juvenile

Court, either formal or informal, in chambers or in court. Nor did the Juvenile Court request any additional information of the two psychiatrists and the psychologist who had examined appellant, or of appellant's counsel. While the record of this case shows that upon last minute evaluation before waiver, the Juvenile Court noted its awareness of the fact that appellant was a probable victim of mental illness, it also shows that the Juvenile Court had no knowledge of what mental illness it was that appellant was probably suffering from and that it had at no time investigated the question as to whether the appellant's mental illness was amenable to treatment and control under the aegis of a Juvenile Court disposition.

Without any opinion or other statement of reasons, the Juvenile Court, on September 12, 1961, entered an order stating that, "after full investigation, I do hereby waive jurisdiction over the following offenses, which would amount to felonies if committed by an adult, charged against MORRIS ALLEN KENT, JR., born October 20, 1944, of 1823 S Street, N. W., in the District of Columbia . . . (enumerating the charges), and I do hereby order said child held for trial for such offenses under the regular procedure of the U. S. District Court for the District of Columbia."

The waiver of appellant, a 16-year old child suffering from lapses of bowel control according to all of the

experts who were ever to examine him, was entered pursuant to Policy Memorandum No. 7 of the Juvenile Court issued on November 30, 1959 and including among its criteria of waiver such considerations as:

> "1 - The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
>
> . . . .
>
> "4 - The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
>
> . . . .
>
> "6 - The sophistication and maturity of the juvenile as determined by consideration of his home environmental situation, emotional attitude and pattern of living.
>
> . . . .
>
> "8 - The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court."

1/ Except for the facts covered by references to the transcript, the facts set forth above appear from the uncontroverted assertions of the motion to dismiss the indictment and its supporting affidavits.

Thereafter, appellant filed a habeas corpus petition in the District Court, asserting that, since the Juvenile Court had never properly divested itself of jurisdiction of his case, the District Court had not acquired jurisdiction thereover. Specifically the appellant asserted in his habeas corpus petition that the Juvenile Court had deprived appellant of due process of law and had not accorded him the "full investigation" which was the prerequisite to waiver under law.

Simultaneously appellant, proceeding on the self-same grounds also noted a direct appeal to the then Municipal Court of Appeals.

Both the dismissal of the habeas corpus petition and the affirmance of the Juvenile Court order of waiver were appealed to this Court, the former several days before the return against appellant of an indictment charging him with 8 counts of rape, robbery and housebreaking.

On January 22, 1960, this Court held in the companion cases of Kent v. Reid and Kent v. District of Columbia, U. S. App. D. C. , F 2d (1963) that habeas corpus did not lie and was "unnecessary to preserve appellant's rights (and) would interfere with and unnecessarily delay the orderly processes of the District Court (Id.,) and that the Juvenile Court order of waiver was not appealable (Id.).

Significantly this Court went on to declare that pro-

ceedings to determine whether "full investigation" was made by the Juvenile Court were available upon a motion to dismiss the indictment in the District Court "if sufficient allegations . . . (were) made." (Id.,).

It went on to declare that appellant was also free to request the District Court to constitute itself a Juvenile Court for his case. (Id.,).

Should appellant's motions be denied by the District Court, this Court then went on to say, the District Court order would "be reviewable by this court in the event appellant is ultimately convicted." (Id.,).

The appellant had already filed with the District Court a motion to dismiss the indictment asserting that the order of the Juvenile Court was invalid and hence incapable of conferring jurisdiction on the District Court under the regular procedure governing the trial of adults. Specifically the motion claimed that the Juvenile Court order waiving jurisdiction was entered in violation of D. C. Code Title 11-914 (1951), of the due process clause of the Fifth Amendment and of the provision for the right of effective assistance of counsel contained within the Sixth Amendment to the Constitution.

The grounds set forth for the invalidity of the order were the same as those contained in the habeas corpus petition and the direct appeal.

The motion prayed that the "indictment be dismissed

and the case remanded to the Juvenile Court unless (the District) . . . Court wishes to assume jurisdiction as a Juvenile Court in this case." (Emphasis supplied).

It was supported by the uncontroverted affidavits by appellant's parents, setting forth appellant's bizarre behavior including lack of bowel control and asserting that such facts were never communicated to the Juvenile Court because no inquiry concerning thses matters was made by the Juvenile Court authorities. It was further supported by the uncontroverted affidavits of appellant's school principal and guidance counselor, concerning evidence of appellant's mental disorders, never communicated to the Juvenile Court, again because of lack of contact with that Court. It was further supported by the uncontroverted affidavit of Dr. Salzman, a psychiatrist, who had examined appellant, at behest of appellant's counsel in Juvenile Court, that he had offered to recommend a treatment situation to the Juvenile Court but that his offer had been spurned. It was further supported by the uncontroverted affidavit of appellant's counsel in Juvenile Court as to his failure to be heard by the Juvenile Court - either formally or informally, as to appellant's illness and the prospects of appellant's rehabilitation under Juvenile Court auspices.

A further motion was filed for the mental examination of appellant at the D. C. General Hospital.

The motion to dismiss the indictment for failure to

accord appellant due process and a full investigation in Juvenile Court was summarily denied and a proffer of testimony of former counsel, relatives and school authorities based upon the affidavits filed in support of that motion spurned likewise. (Transcript of Proceedings Before Chief Judge McGuire Feb. 8, 1963, pp 16-21).

An oral motion, founded upon the motion to dismiss, requesting the District Court "to constitute itself a Juvenile Court" was summarily denied by the Chief Judge of the District Court "with emphasis." (Transcript of Proceedings Before Chief Judge McGuire, Feb. 5, 1963, p. 16 and Feb. 8, 1963, p. 21).

While refusing to accord appellant any opportunity to be heard on the denial of his rights in Juvenile Court and refusing to permit the payment of appellant's expert witnesses anything beyond the nominal witness fee, the District Court, referring to some of the prospective expert witnesses for the defense declared that it "had a suspicion . . . that this (presumably the entry into this case of psychiatric experts outside the ranks of the public hospitals) is . . . a stimulated activity, and I am concerned about the activities of the National Institute of Health and the Washington School of Psychiatry . . . (and) if that . . . (was) so, somebody . . . (was) going to get in serious trouble." (Proceedings Before Chief Judge McGuire, Feb. 18, 1963, p. 26). It thereupon directed

appellant's counsel to "advise" the District Court "by the end of the week" about the activities of the suspect Washington School of Psychiatry (Id., pp. 28-29) which had furnished appellant with some of his prospective expert witnesses.

One such expert was referred to at that time by the prosecuting counsel, without reproof by the District Court, as "that Goshen from West Virginia, that Dr. Goshen, I mean . . . , hooked up with that Washington School of Psychiatry . . ." (Id., 27-28) (Emphasis supplied).

The motion for mental examination at the D. C. General Hospital, however, was granted. Unwilling to accept the evaluation of the D. C. General Hospital staff the prosecution had insisted upon inclusion within the court order directing such mental examination, the statement that the hospital was to afford prosecution psychiatrists, outside of the hospital staff, access to the appellant.

When the D. C. General Hospital reported that it found appellant to be a victim of schizophrenia and his crimes, if any, the probable products of his illness and pronounced appellant mentally incompetent to stand trial, the Government objected to the D. C. General report and the District Court, acting sua sponte committed appellant for further examination at St. Elizabeths. St. Elizabeths Hospital in turn certified appellant as competent to stand trial but expressed the firm opinion that the appellant was

schizophrenic and his crimes, if any, the products of his disease.

At this stage not one, but two government hospitals had pronounced appellant schizophrenic and his crimes, if any, a product of his mental disease.

A motion for a judicial determination of appellant's competency to stand trial resulted in a hearing in a District Court. While the prosecution succeeded in securing last-minute psychiatric examination of appellant in the District Jail by staff members of St. Elizabeths Hospital, the defense did not succeed in obtaining a court order for a further examination by members of the staff of the D. C. General Hospital. A defense psychiatrist, Dr. Warren C. Johnson, obtained through the Washington School of Psychiatry, attempted to see appellant in the District Jail to bring his findings up to date after the appellant's transfer to the District Jail from St. Elizabeths Hospital. He was squarely informed by the jail authorities that he would not be admitted to the Jail to examine his patient. (Affidavit of Dr. Warren C. Johnson in District Court).

Without expert witnesses of his own with recent contact with appellant on the subject of his competency to stand trial, appellant's counsel requested further hospitalization of appellant in aid of a judicial determination of competency and supported his request with a medical affidavit by Dr. Johnson. His request was denied.

At the competency hearing, one St. Elizabeths psychiatrist testified in conclusory terms that appellant was competent to stand trial although he admitted that appellant's recollection of events touching the period of the indictment appeared defective (he suggested but at no time claimed that appellant might be malingering to some extent); another testified in similarly conclusory terms that appellant was competent but that he had no problems with his recollection, while appellant's counsel himself testified that he had never succeeded in maintaining rational communication with his client.[1/]

The District Court declared that in its "opinion, primarily, the question of competency to stand trial is primarily a medical question." Addressing itself to defense counsel, it then declared as follows:

> "I have before me the testimony of Doctor Owens and Doctor Platkin . . . in whose professional standing, ability and competency I have great faith and great confidence.
>
> "Of course, I have no question that what you tell me is true, but I think that with you this defendant may well be malingering.

It then adjudged the defendant competent to stand trial. (Transcript of Proceedings Before Judge Hart, March 7, 1963).

1/ The record contains the sworn statements of two counsel working for the defense, in addition to the testimony of Mr. Sandground that rational communication with appellant was impossible.

The case proceeded to trial to a jury on March 14, 1963. Prior to the opening statement of the prosecutor, the trial Court sustained a motion to suppress the evidence seized from defendant and from his home, and his confession was not to be offerred by the prosecution. (T 16).

The prosecution called a number of witnesses in its attempt to establish the guild of defendant on the indictment. The first witness called by the prosecution was Juanita A. Echols (T 28) who testified that in the early morning hours of June 5, 1961 she lived alone in apartment 508, 5th floor of 2153 California Street, N. W., Washington, D. C.; that there was a fire escape leading to the kitchen window of said apartment; that she was awakened at approximately 1:00 in the morning by a figure who leaped on her couch and grabbed her; that she started screaming, told the person her billfold was on the dresser, and he dragged her over to where the billfold was and which contained $12.00; that he put the wallet in his pocket, dragged her back to the couch and had sexual intercourse with her. The prosecutor then informed the court as follows (T 36):

> "May I inform the Court and counsel of something in regard to this witness here. At a subsequent point of time a man named, I think, Lanham, was picked up and put in the lineup and viewed by this defendant, by this complaining witness, and she was unable to identify Lanham. At a subsequent point of time a man whose name I think was Thurston, both of these were Negro males, was put in a lineup and she identified Thurston as the person who had been in her apartment. Thurston was not in fact the person who was in there."

That she was not able to identify the person who was in her apartment (T 47-48) that she later identified a man at a police lineup as the intruder who was not the defendant. The witness never testified she failed to give consent to the alleged conduct of the intruder.

The prosecutor next called as witnesses Dr. Helms, then Officer Allen, then Officer Carlson, then Officer Kline, then FBI laboratory agent Cornelius G. McKnight, all of whom gave testimony tending to show there was an act of intercourse had by the complaining witness with a male on June 5, 1961.

The prosecutor then called as a witness Officer John Becker, Identification Bureau of Metropolitan Police Department (T 76) who testified that on June 5, 1961, after midnight he developed four latent fingerprints which were on the window ledge of apartment 508; that one of the four was identical with the rolled print of No. 9 finger of appellant (taken from appellant after his arrest); that there were some latent fingerprints of others on the same window ledge which the witness never attempted to identify (T 91-92).

The prosecution then called Gloria Jean Palmer as a witness (T 96) who testified that in the early morning hours of June 12, 1961 she shared apartment No. 303, 1311-30th Street, Northwest with one Constance Walsh who did not testify; that about 1:30 in the morning she was awakened

by a hand over her mouth; that she screamed and the individual went out the door; that she was not able to identify the alleged intruder; that after the police visited her apartment, they asked her to check to see if anything was missing (T 103); that she then discovered her wallet with $47.00 in it was missing; that she thereafter saw smudge prints on the wall; that she cannot identify the appellant as the intruder (T 107); the Court denied defense counsel's motion to strike the testimony of this witness (T 108).

The prosecution then called Officer William R. Holden as a witness, (T 108) and he testified he saw several smudges on the wall of said apartment when he inspected same.

The prosecution then called Officer James Jones, of the Identification Bureau as a witness (T 111) who testified he examined smudge marks in the hallway of the premises; that he developed a latent fingerprint which was on the closet door located in the hallway of the apartment; that he compared this print with the rolled print taken from appellant as heretofore described, and they were similar.

The prosecution then called Mary L. Murphy as a witness (T 131) and she testified that in the early morning hours of September 2, 1961 she lived alone in apartment 307, 1717-20th Street, N. W.; that the living room window led out to the fire escape; that her wallet containing

$12.00 was about seven feet from her bed, near the kitchen; that she was awakened by someone's hand on her neck; that such person said "If you are not quiet, I will kill you; that "I lay quiet and he raped me; that he then left through the kitchen door (T 139) and she then called the Metropolitan Police Department; that after detectives arrived, she did not look around the apartment (T 142); that after the officers came from No. 3 Precinct, "I found my wallet was gone with the $12.00 (T 144); that the appellant was the person who raped her (T 148).

The prosecution then called officer Robert M. Boyd, third precinct, as a witness, and he testified he responded to the premises at approximately 4:45 A.M. on September 2, 1961, and he described the appearance of Miss Murphy (T 152-161).

The prosecution then called police woman Ernestine Johnson as a witness (T 162) and she identified Murphy's night gown.

The prosecution then called detective Wolfgang as a witness (T 164) and he testified he visited Murphy's apartment after 5:00 A.M. September 2, 1961, and identified photographs of the interior of the apartment and certain articles taken by him from there, and that he took some of the items with another officer to the FBI laboratory; that he saw and talked to Murphy on this visit; that he and other officers placed defendant under arrest about 3:00 P.M. Sept. 5, 1961 (T 178) at home of defendant 1823 S Street, N. W.,

that Murphy first gave description of her assailant as a Negro between the ages of 25 and 30 (T 180).

The prosecution then called FBI agent Allison C. Semmes as a witness (T 182) and he testified regarding the articles turned over to him from the Murphy apartment.

The prosecution then called Officer Robert H. De Milt as a witness (T 189) and he testified he visited the Murphy premises at 8:00 A.M., took a table from the fire escape to the identification bureau at police headquarters (T 194) after a latent fingerprint appeared on the top step of the table.

The prosecution then called police Sergeant Hayden of the Detective Identification section as a witness (T 196) and he testified he rolled the prints of defendant on Sept. 5, 1961 after defendant was arrested in this case; that he lifted a latent fingerprint from the table taken from the Murphy apartment and it compared with the rolled print he took of defendant (T 206); that he could not state how long the latent fingerprint had been on the table.

The prosecutor then volunteered to the Court that Echols identified another person, not the defendant, from a photograph as the intruder, but could not identify that person when seen in a lineup (T 213). The prosecution then rested its case (T 215).

Counsel for defendant then moved for judgments of acquittal on all counts of the indictment (T 215) and said motions were overruled.

The defendant then called as a witness Mrs. Courtney T. Kent, the defendant's mother and she testified that when the defendant was 2 years old he witnessed his father attempting to choke her to death (T 218); that immediately thereafter he became very nervous and would run and hide from his father; that his behavior changed and "he would be in a trance" (T 220); that at times his teacher "couldn't get him to hear her. He repeated his grades" (T 220); that "he couldn't control his bowels up until they picked him up at the age of sixteen"; that when he was sixteen" someone gave him a lovely puppy and he carried it off and killed it. But he grieved so after it"; that he would cover the windows in his room "because he said voices would tell him to do things and he couldn't help himself. They would tell him to go down and look at the television and after he went down there, he said they told him to go out in the street and he couldn't help himself" (T 221); that her son would talk when no other persons were around, "and I would ask him what he was saying; and he said, Don't bother me; and so many different times I tried to talk to him and he didn't hear me. He couldn't hear the doorbell ring at times. At times, he was in a deep study" (T 221); that when the defendant was in the Receiving Home at the age of 14 charged with committing an offense, he told her "he didn't understand it and he hoped God would take care of him because it was going to happen again soon and he

just didn't understand it" and "Please, Mama, get a psychiatrist for me because I don't understand." (T 222-223); that he would have nightmares and "he would rise up in bed reaching for something all the time when I would awaken him. He would act as if he was reaching from something. And he said something was always after him and talking to him" (T 225); that she questioned him about these voices "and he said, Mama, they talk to me when I am walking along the street, and they tell me to run in a lady's house or on a porch and then the police want to pick me up when they catch me running" (T 225); that he was disturbed all the time; that "he would sit down and didn't say anything to anyone and he just seemed to be deaf, and then he would have these fits and he broke up things in the house at times and then he was sorry afterwards" (T 227).

The defendant then called Thomas C. Cope as a witness (T 241) who testified he was a high school teacher and uncle of defendant; that he observed behavior of teenage boys in his school and also the behavior of defendant, and found defendant "to be an individual of abnormal behavior (T 243); that:

> I have had him to do little chore jobs like raking leaves at my country place and I have found him standing with his hand on the rake and laughing and talking to himself, and I have called him and approached him until I would get within about two or three feet of him where I would tap him on the shoulder before I could get his attention. And then when I did get his attention, he would say, "Oh, Uncle Tommy; Oh, Uncle Tommy, I am doing it."

"Then on one other occasion, I had him to scrub the porch. I got the hot water, gave him the soap powder and started him to scrub the porch. About ten minutes later, I came around the house to see what he was doing and he was just standing up looking and I said, "What are you doing?" And he said, "Oh, I am through scrubbing the porch." Well, he hadn't even started, practically, to scrub the porch.

On the third occasion, I had him raking up some apples in the rear portion of my orchard and he raked about a half a dozen apples and I walked around to the side of the house to observe him and I saw him motioning to something and talking and mumbling as if he was striking at something. And then I walked closer to him and he said, "Get away from here. Get away from here, you always bother me. Get away."

The defendant then called Dr. Katherine Beardsley as a witness who testified she was a clinical psychologist at St. Elizabeths Hospital (T 251); that she examined defendant four times in March, 1962; that she "administered the Wechsler Scale, the Bender Gestalt, the Behn Rorschach, the Thematic Apperception Test; the house-tree-person; and the Szondi" (T 254); that a history was available to her at the time the tests were made; that her "opinion, on the basis of my tests, the test results were consistent with a diagnosis of chronic undifferentiated schizophrenia" (T 255); that this is a psychosis and a mental disease; that defendant had this condition in June, 1961 and September, 1961 (T 257); that but for his mental disease at the times the offenses alleged in the indictment would not have occurred (T 257); that she made the test results available to the psychiatrists at St. Elizabeths Hospital (T 259); that it

is part of the diagnostic process for psychiatrists; that the manual of mental disorders published by the American Psychiatric Association classifies defendant's mental disease as a psychosis (T 260).

The defendant then called Dr. Mauris M. Platkin as a witness (T 295) who testified he is a psychiatrist at St. Elizabeths Hospital and that a history of defendant was taken in the hospital under the Doctor's supervision and was available to Platkin (T 296); that he examined defendant on a number of occasions between January 8, 1962 and April 9, 1962 (T 296); that in June, 1961 and September, 1961 the defendant was suffering from "a schizophrenic reaction, chronic undifferentiated type; that this is a psychosis and a mental disease" (T 300); that this diagnosis was arrived at by the Doctor as follows:

> "In view of the history as presented, the collateral information for which we wrote from many sources, the interviews with various people, that is, members of his family, interviews with the patient, psychological examination, my own observations, reports from the ward as to his behavior, in view of all these and discussion with colleagues who had seen him and examined him, in view of all of these examinations and observations, it was my opinion that he was suffering from a schizophrenic reaction, chronic undifferentiated type."

The witness further testified that the foregoing is a mental disease and a psychosis; that defendant was suffering from this mental disease in June and September, 1961 (T 301). This witness then explained the dynamics of said

disease to the Court and jury and how the defendant was so affected (T 301-305); that in the Doctor's opinion the acts alleged against defendant were the product of the defendant's mental disease (T 304); that the defendant is now suffering from this mental disease (T 307); that but for his mental disease the defendant would not have committed any of the acts alleged (T 342); that the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association is the manual "by which all hospitals and most private physicians use in establishing diagnosis", and defendant's type of mental illness is listed therein (T 344).

The defendant then called Dr. William Novak as a witness who testified that he was "clinical director of the department of psychiatry at the District General Hospital" (T 346); that he examined defendant in October, 1961 in accordance with his official duties; he testified as to defendant's history; that he examined defendant approximately eight times (T 349); that based on defendant's "history and my work with him as well as the observations of my colleagues and the conferences among us, we felt that he seemed to be having periodic psychotic episodes at that time" (T 350); that in June and September, 1961 the defendant was suffering from "schizophrenic reaction of the undifferentiated type", and this is a mental disease (T 350); that the acts allegedly committed by defendant were products of his mental disease (T 352).

The defendant then called Dr. John L. Endacott as a witness who testified he was the Assistant Chief Psychologist in the Mental Hygiene Clinic in the Veterans Administration (T 376); that prior to such employment he had many years of experience as clinical psychologist in institutions named by him, and had been a practicing psychologist for twenty-five years (T 377); that he examined defendant and gave him tests on four different occasions, November 5, November 19 and December 3, 1961 at the D. C. General Hospital, and on March 3, 1962 at St. Elizabeths Hospital (T 378); that such tests were Wechsler-Bellevue Adult Intelligence Scale, the Graham-Kendall Test for Organic Brain Damage, the Rorschach Test, and the Sumonds Picture Story Test (T 378); that the tests indicated the defendant was suffering from schizophrenia, undifferentiated type (T 379); that this is a mental disease; that the acts charged, if committed by defendant, were directly the result of the schizophrenic condition, and but for this schizophrenia the defendant would not have committed the acts (T 380). There followed 33 pages of cross-examination regarding the tests and the manner of giving them.

The defendant then called Dr. John V. Kavanagh as a witness who testified that he was employed by the Department of Health, Education and Welfare and that he had specialized training as a Psychiatric Social Worker; that he was formerly employed in such capacity with the United States Army

and the Veterans Administration (T 437); that he interviewed the defendant three times in the spring of 1961 at the request of Father Davis, the principal of Mackin High School because:

> "Father Davis felt that the boy was not producing the work that he should have. Teachers in classrooms were becoming alarmed because he was not paying as strict attention to the class as he might. He was laughing inappropriately at times and he just wasn't showing vitality that a boy as young and healthy as he seemed to be, should have shown."

The witness further testified that based upon his experience in the field of psychiatric social work, he felt there was something wrong with defendant, and that the defendant needed psychiatric help (T 439).

The defendant then called Dr. Malcolm Meltzer as a witness who testified he was employed as a clinical psychologist by the Veterans Administration and by Duke University (T 443); that he was formerly a research scientist at Georgetown University Medical Center and clinical psychologist at D. C. General Hospital; that he gave tests to the defendant on October 25, October 26, and December 4, 1961 at D. C. General Hospital as part of his official staff duties there (T 445); that based on such tests, his opinion was that in June and September, 1961 the defendant was suffering from a schizophrenic reaction, "and that during the period such as the one described there would be times of psychosis, unrealistic thinking, poor judgment, loose

associations, poor impulses control and unrealistic picture of the world" (T 446); that it was highly likely the defendant was suffering from a mental disease; that if the defendant committed the acts charged, it is highly likely they were caused by his mental disease (T 447); that but for such mental disease, the defendant would not have committed such alleged acts; that he gave the defendant the Wechsler Test, the Rorschach test, the Human figure drawing test, the Thematic Apperception Test, the Portens maze test, and the Kohn test; and then there followed 20 pages of cross-examination of the manner of giving the tests.

The defendant then called Dr. Dorothy S. Dobbs, staff psychiatrist, St. Elizabeths Hospital, as a witness who testified she was assigned to the maximum security division in that hospital (T 472); that in the course of her official duties, she examined the defendant on 3 or 4 occasions other than the staff conferences between January 8, 1962 and April 9, 1962 (T 473); that she had available a psychiatric social history of defendant, part of which she took (T 473); that based upon the history and examinations, she was of the opinion the defendant in June and September, 1961 "was suffering from schizophrenia reaction, chronic undifferentiated, which, of course, is a mental disease" (T 474); that this is a psychosis. The then testified to the psychodynamics of Kent's mental disease (T 474-476); that if the acts charged were committed by defendant, they

were products of his mental disease (T 476); that on the basis of the history and findings, the defendant's mental illness in June and September 1961 was severe (T 477). There followed many pages of cross-examination by the prosecutor, which like his cross-examinations of other defense witnesses, did not change the effect of the testimony. However, it must here be noted that there was absolutely no basis in the record for the prosecutor's hypothetical questions to this witness (T 491) based on the alleged assumption that the intruder had already taken Palmer's money "before he touched her" (T 491, 497), and also the hypothetical question asked of this witness (T 500-501) based on the assumption that the intruder took the wallet in the Murphy home prior to having sexual relations with her.

The defendant then called Dr. Warren C. Johnson as a witness who testified he was a psychiatrist in private practice, a diplomate of the Board of Psychiatrists and a member of many named psychiatric organizations (T 516); that he examined the defendant three times in 1961 in the jail and D. C. General Hospital; that he took a history from defendant and also had other clinical histories available to him (T 518); he explained the dynamics of his examination of defendant (T 519-521); that his opinion of defendant's mental condition in June and September 1961 was "that this person at that time was suffering from schizophrenia

and that he has had a schizophrenic picture for some time and still continues to demonstrate examples of a mental disorder which we call schizophrenia; that when he examined defendant again in St. Elizabeths Hospital on February 2, 1962 he was "more and more in the paranoid type of schizophrenic" and had been placed in "a disturbed ward" (T 523); he then explained the dynamics of the new symptoms of defendant (T 524-526); that if the defendant committed the crimes charged, they were the products of his mental disease (T 528); on cross-examination this witness gave the dynamics of the defendant's mental disease (T 549-554).

The defendant then called Dr. Bernard Levy as a witness who testified he was director of psychological services for the D. C. General Hospital (T 560) and during the past five years had given patients "between a thousand and two thousand psychological tests; that on September 9, 1961 he gave defendant the Rorschach test at the Receiving Home; that on the basis of this test the defendant in June and September, 1961 was suffering from "a psychotic condition, schizophrenia, to be more exact, type, undetermined (T 563); that if the defendant committed the crimes charged, they were the product of his mental illness, and the alleged crimes were directly related and proximately caused by the mental illness (T 563); the witness then gave the dynamics of the defendant's test (T 563-564); and on cross-examination (T 568-597).

The Court then read to the jury the following stipulation agreed to by the Government and defendant (T 600-602):

"THE COURT: Ladies and gentlemen of the jury the attorneys for the Government and for the defendant have agreed upon a stipulation about certain evidence which I am going to bring to your attention at this time.

This stipulation constitutes evidence in the case and evidence for your consideration, just as if the witnesses named in the stipulation, took the witness stand and were examined and cross-examined.

The stipulation is as follows: If Doctor William Hamman and Doctor James A. Ryan, were called as witnesses in this case they would be recognized by the Court as experts in the field of psychiatry, as both individuals are medical doctors, specializing in the field of psychiatry.

It is stipulated that Doctor Hamman would testify that he is the staff psychiatrist at Saint Elizabeths Hospital, and that Doctor James A. Ryan is a staff psychiatrist at the District of Columbia General Hospital. It is stipulated between the defendant and the Government that both witnesses would testify that they had given psychiatric examinations to the defendant in the fall of 1961, and had available to them at the time of these examinations, pertinent history concerning the defendant.

Both witnesses would testify that on the basis of their individual psychiatric examinations, they were of the expert opinion, to a reasonable medical certainty, that the defendant, Morris Allen Kent, Jr. was suffering from a mental disease, that is, schizophrenia of an undifferentiated type; a mental disease and considered in the classification of a psychosis.

Both would testify as to their expert opinion to a reasonable medical certainty, that all of the crimes of rape, robbery, and housebreaking, if committed by the defendant, at the times and places as set forth in the indictment, were the direct product of the mental disease, that is, schizophrenia, undifferentiated type,

and in their opinion, but for the presence in the defendant of this mental disease at the times and places set forth in the indictment, the defendant would not have committed the acts.

Both would testify in their expert opinion to a reasonable medical certainty that the defendant's volitional controls were substantially reduced during the times and places as set forth in the indictment, directly because of this mental disease."

The defendant then called Cornelia Dawson as a witness (T 602) who testified she is an aunt of defendant and has known defendant all his life; that defendant was always extremely nervous and the least little thing would upset him and make him cry; "quite distant"; that "when we would go around to visit him he would often go to his bedroom or go out in the street, or go to the basement. And he had very little to say . . . He just seemed to not want to be bothered" (T 604); that defendant was a very poor sleeper and no control of his bowels, and would put "the excretion . . . all over his body, his neck, and his face" (T 605); that defendant was extremely afraid of his father.

The defendant then called Mrs. Thomas Cope as a witness who testified she was defendant's aunt (T 608) and she had known him all his life; that she lived in same house with defendant for 10 years and saw him often (T 608); that "I noticed Morris' span of attention was very, very short. And also I noticed if the door bell rang Morris wouldn't answer it and as a matter of fact, he would say he never heard it. And if the phone would ring that

that didn't bother him, he didn't hear it. And when children would come around for instance my grandchildren and other children, Morris would withdraw himself from everyone and would go in a room perhaps and darken the room and sit alone and look in space" and in his sleep "he used to grit his teeth an awful lot at night. He talked all during his rest, and many times he would fall out of the bed" (T 608-609) that defendant had no control over his bowels whatsoever (T 609); that defendant feared his father and would run and hide from him; that when defendant was about thirteen, she talked to the Juvenile Court authorities about his conduct and to them "I mentioned Morris' actions and I felt that Morris needed help, and it seemed to have been growing worse, and I asked them while they had him there if they would give him psychiatric care, because I was most concerned about him, because he was getting worse" (T 612); that she saw a further change in defendant's personality when he was between 13 and 16, and "Well when he was between those times, of course, his chores, we would give him more, and he would start on something and then he would be engaged in a long conversation with someone. You would think the room was full of people. And many times I would call him and he wouldn't answer. And I would go to him and tap him on his shoulder, and I would say, Morris, and it didn't dawn on him that he hadn't finished the job. He would only do part of it, just

like a child five years old. And he would think the job was well done. And he was always so willing to do his very best, and he was always wanting to do something." (T 613).

The Court then admitted in evidence a document entitled "Social Study" which is a Juvenile Court record dated 3-17, 1959, and which purports to be a social study of defendant at that time (T 622-627), and a portion of a Juvenile Court probation report dated September 8, 1961 (T 627); the second report states in part: "The marked duality in his pattern of adjustment suggests the rapid deterioration of his personality structure and the possibility of mental illness" (T 628).

The defendant then called Dr. Charles E. Goshen, as a witness who testified he was Associate Professor in the Department of Psychiatry, West Virginia University School of Medicine (T 633); that he was certified as a diplomate by the American Board of Psychiatry and Neurology in 1948; that he examined defendant on September 16, and September 29, 1961 and in December, 1961 (T 634); that he concluded defendant was suffering from schizophrenia, chronic undifferentiated type (T 635); the witness then gave the dynamics of the defendant's mental illness (T 635-642); that the crimes charged, if committed by defendant, were products of his mental disease in June and September 1961 (T 642); the witness maintained his position on cross-

examination (T 650-658) even though the prosecutor's hypothetical question was not based on the evidence (T 654).

The defendant then rested his case.

The prosecution then called Dr. David J. Owens as a witness in rebuttal who testified (T 669) that he was clinical director of the maximum security unit at St. Elizabeths Hospital; that he was present at the medical staff conference in this case on April 4, 1962 (T 671); that after he interviewed defendant and at the diagnostic staff conference he was of the opinion that defendant was suffering from a mental disease on June 5, June 12, and September 2, 1961, "schizophrenic reaction, chronic undifferentiated type" (T 672); in his attempts to rebut "productivity", the prosecutor asked this witness a hypothetical question on the Echols counts that was not based upon admitted facts or upon facts disclosed in the record (T 659); that the witness answered this improper hypothetical question by stating "assuming the information that you gave me, I would say that schizophrenia was not - - did not cause the robbery itself" (T 674); Q. "and how about the housebreaking?" A. Probably not - - I would have no opinion about the housebreaking." Q. Did, in your opinion, the chronic schizophrenia that you diagnosed cause this defendant to rape this woman? A. I would have no opinion on that" (T 674); in his attempt to rebut "productivity" on the Palmer robbery count, the prosecutor then asked this witness a

hypothetical question that was not based upon admitted or upon facts facts/disclosed in the record (T 674-675) (especially when he asked the Dr. to assume "that he thereafter came in the apartment and he first took a wallet, a woman's purse, containing a certain amount of Gloria Palmer's money; and that after he had taken that wallet, Miss Palmer was awakened with hands over her mouth . . ."); the Doctor then answered this improper question whether the alleged robbery was caused by this disease by stating "Probably not" (T 675); in his attempt to rebut "productivity" on the Murphy robbery count, the prosecutor then asked this witness a hypothetical question that was not based upon admitted facts or upon facts disclosed in the record (T 675) (especially when he asked the Doctor to assume that "he went in there and took this lady's money first"); the Doctor then answered this improper question as to whether the Murphy robbery was caused by defendant's disease by stating "The robbery was probably not, assuming the information that you gave me." (T 676) This witness then gave the dynamics of defendant's mental disease (T 677-678), during which the following occurred:

> Q Now doctor, will you explain to His Honor and these ladies and gentlemen of the jury, your reasons as a psychiatrist for the opinions you have heretofore given, namely, that you saw lack of causation between your diagnosis of the disease and the robberies and your lack of zbility to form an opinion as to whether or not there was a causation

in regard to the three housebreakings and the two rapes?

A. Well, in my opinion this patient is suffering from schizophrenia. He has a mental illness. Now as to the symptoms that were present, there were a number of symptoms of the schizophrenia that were present.

Do you want me to elaborate on these or just on the causality? The difficulty that I had there?

Q. No, sir. I want you to inform His Honor and the jury as fully as you can on the symptomatology and on the lack of causation and your lack of ability to form an opinion on the causation on the rapes and the housebreakings?

A. The symptoms that were present which is one of the cardinal symptoms of schizophrenia, was the thought disturbance and the affect of the emotional disturbance, and the splitting between the two. This is where the term schizophrenia comes from.

There is a symptom that his thinking was not consistent or it did not follow the emotions of the individual. This is probably the most significant symptom of schizophrenia. The inability to probably arrive at an opinion as to productivity in this particular case is mainly based on the fact that in his symptoms there was considerable sexual preoccupation, that is difficulty with sexual thoughts, sexual ideas, and he had extreme difficulty understanding some of his sexual feelings.

Now if primary motivation for committing a crime would happen to be the sexual desires, which were involved with his illness, then this would be productivity. If the primary motivation were robbery or to get something to eat, then this would not be connected with the sexual preoccupation which was in turn a symptom of his illness.

This is the reason that I have difficulty in arriving at a firm opinion as to the productivity.

Q. Now doctor in the assumed three situations that I have given you in regard to the Echols woman, who was practically nude, and in

the Gloria Jean Palmer woman, and in the Mary Murphy woman, Murphy being raped under the assumed statement of facts, does the assumed statement of facts, the fact that the robbery took place first in point of time, before the sexual acts of the two, have any significance to you as a psychiatrist?

A Well assuming that this was the primary motivation, that he went there for to rob, that is to rob someone, this is his first interest when he got there, then this would be quite significant, meaning that he entered the building for this purpose.

On the other hand, if assuming that he did not go for this and he should have gone primarily for the sexual reasons then this would be different.

Q If doctor, under the assumed statement of facts that I have given you in regard to the Echols lady, who was practically nude, and who was raped, and the Murphy lady, who was raped, and the Palmer woman, who was touched on the mouth, if the primary motivation in this defendant's mind for going into those three apartments, had been sexual, in other words, to attack women? In your opinion as a psychiatrist, would he have attack the women first and then taken the money, as he didn't do or would he have taken the money and then attack the women as he did do under the assumed statement of facts?

MR. SANDGROUND: Your Honor, I object to that question. It goes into the assumption as the primary motivation of which there is no evidence, and which the witness has said he could only speculate about. This is a hypothetical question with an assumption which is not tied in with the evidence as the primary motivation. I think it is improper.

THE COURT: The Court will overrule the objection. Answer the question, doctor.

A I would say his primary motivation was robbery.

Q Will you explain why on the basis of your last answer to my rather lengthy question that preceeded it?

A Because this is the first thing that he did.

> It is very simply and I can answer this is what he did first. This is assuming that this is correct, his motivation was accomplished by his first act when he entered.

On cross-examination, the Doctor testified that at the St. Elizabeths staff conference, there was unanimity of opinion that the defendant was suffering from a mental disease at the time of the commission of the crimes, that is "schizophrenic reaction, chronic undifferentiated type (T 681); that this disease is considered a psychosis (T 682); that on the basis of his examinations of defendant, he had no opinion as the causal connection between the crimes and the defendant's mental disease (T 682-683); that the reasons for his possible change of opinion as to the causal connection between the robberies and the mental disease was answered by the Doctor as follows:

> A I don't think it is so much a change of opinion. I think my opinion is still that I don't have a firm opinion one way or the other. However, assuming the information that Mr. Lowther gave me concerning the alleged criminal offenses, assuming that it was correct, then he the patient, I have some additional information which I was not familiar with at the time of the medical staff conference. I did not have this information from the patient. I did not have it from other sources.
>
> And I am only assuming that this is correct. If this is correct then his motivation for going to the apartments was - - it could have been robbery or it could have been for sexual purposes or it is possible that it could have been for both. (T 683)

> Q When you stated that in your opinion the prime motivation of the defendant on entering the apartment was for robbery, isn't this merely a speculation on your part as to the

> question as to what was the prime motivation and as to what was a secondary motivation?
>
> A. Well, my opinion is based on the assumed facts - - now if the assumptions that I was given, if these were not correct, then certainly my opinion would be changed. (T 685)

that the witness does not know what was the prime motivation of defendant in allegedly entering any of the apartments (T 685-686).

On redirect examination, over the objection of defendant, the prosecutor again asked the improper hypothetical questions of this witness that were not based upon admitted facts or facts disclosed in the record ("robbery first") (T 687-688); the Doctor then answered these improper questions as to whether the alleged robberies were caused by the defendant's mental disease by stating: "I would say that from the information that you have just given, if this is correct, then I cannot see a connection between a robbery and his illness" (T 688)

The prosecution then called Dr. John R. Kavanagh as a witness in rebuttal (T 689) who testified that he examined the defendant four times at the request of the United States Attorney's office (T 690); that he decided defendant did not have a mental disease on the dates of the offenses alleged in the indictment (T 690); that his opinion "was based on all of these examinations and depended, of course, in large measure on what he said to me" (T 691); he then testified as to the basis for his psychiatric opinion, most

of which repeat the defendant's conversations with the witness had during such examinations (T 691-692); this witness did state the defendant was suffering from a "form of sexual perversion and transvestism"(T 700); that defendant had a nervous manifestation, "sometimes referred to as an irritable colon or spastic colon" (T 701); the Doctor then concluded his testimony on direct examination by stating:

> Now these represent a summary of our findings. I have tried to present them to you in a way which offers to you those things which might be considered to be of a psychotic nature and indicate unsoundness of mind, such as the voices. But on the whole, I think that the history that I present here is one including the voices, which I think are quite understandable in an individual who has these tendencies. And by tendencies I mean the schizoid tendencies that he has. That they do not represent a picture which I could consider that of an individual who has an unsoundness of mind or, in my own terms who is psychotic. (T 702)

On cross-examination, this witness testified "I hope I haven't given that impression" that defendant is a normal individual (T 704); that defendant has a "schizoid personality" (T 705); that in his opinion a personality disorder in which the schizoid personality would be included does not represent a disease in either the terminology used by the Court or the terminology used by psychiatrists (T 706); that the defendant's withral during the examinations of him by the witness "was one of the manifestations of the symptoms of schizophrenia" (T 708) that some things done by defendant constitute a form of sexual perversion, and

according to the classification given by the witness "it would come in the classification of sociopathic personality disturbances in which sexual perversion is a sub-variety. So it is my opinion it would be evidence of a personality disorder rather than a disease" (T 710) (Emphasis supplied); that he is familiar with the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association and personality disorder was a valid classification of mental diseases and disorders when listed in said Manual (T 710); that other conduct exhibited by defendant is also evidence of a personality disorder (T 711); that he would define the mental condition that he found in defendant as being that of a schizoid personality (Emphasis supplied) (T 716); the Doctor further testified "It is my feeling that in my examination, I did not find anything more than a schizoid personality and granted perhaps a schizoid personality may go ahead and become schizophrenic, I found no evidence of schizophrenia" (T 718); that he would classify the schizoid personality as a personality disorder (T 719); that it is so classified in the Statistical Manual (T 720); that he had the aid of psychological tests given by Dr. Bernard Levy when he reached his diagnosis of defendant; that these tests indicated that the defendant was suffering from schizophrenia, undifferentiated type (T 725).

The prosecutor then told the Court that "a man named Diamedes Puilos (not called as a witness) who lived in apartment 507 in the Echols building and who, when interviewed, said that he was awake until the police arrived and he heard no screams (T 727).

Both sides then rested their cases.

The defendant then again moved for a judgment of acquittal and the motion was denied by the Court (T 730).

The prosecutor then argued his case to the jury and stated that the alleged robberies were committed before the alleged assaults. (T 740-741). This is not based upon the facts disclosed in the record. His inflammatory castigation of the defense witnesses (T 743-745) in his argument was prejudicial and unwarranted as disclosed in the record of trial.

In his rebuttal argument, the prosecutor again stated the evidence showed the alleged robberies were committed before the alleged assaults (T 762), which is not based upon the facts disclosed in the record, and again castigated some of defense witnesses in an unwarranted and prejudicial manner (T 764-766).

The Court thereupon charged the jury (T 776-820); in his original charge to the jury and before the jury retired to consider its verdict, the Court gave this version of the

Allen or "dynamite" charge (T 815-816):

"You have before you all of the evidence which the Government and the defendant can offer in this case. The verdict which you return to the courtroom should represent your individual opinions. In other words, each of you must arrive at your own verdict; but this does not mean that your views, your opinions may not be changed by conference in the jury room. The object of the jury system is to secure a unanimous verdict by comparison of views and by arguments and by discussion among the jurors themselves. Each of you should listen with deference to the arguments of the other jurors and with a distrust of your own judgment if you find that a large majority of the jurors take a different view of the case than that which you yourself take.

None of you should go into the jury room with a blind determination that the verdict should represent your opinion of the case at the moment you leave the courtroom, or that you should close your ears to the arguments of other jurors who are equally honest and equally intelligent with yourself. Accordingly, although the verdict must be the verdict of each of you individually and not a mere acquiescence in the conclusion of your fellow jurors, the Court instructs you that you should examine the issues submitted with candor and with a proper regard and deference to the opinions of each other. It is your duty to decide this case if you can conscientiously do so. You should listen to each other's arguments with a disposition to be convinced.

If in any question put to you for a vote by your foreman, any one of you should find that you are a very pronounced minority on any question, you should appraise your situation. You should ask yourself, Why did this evidence make such an impression on me when it didn't make a similar impression on a great number of other jurors who are equally honest and equally intelligent with myself?

I repeat, your verdict must be a unanimous one. It must represent your individual view of the case, but you should not solidify your judgment in the case until you have had an opportunity to listen with an open mind to the discussion of all of the other jurors in the jury room."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

The Sixth Amendment to the Constitution of the United States provides in part:

> "In all criminal prosecutions the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Title 11-912 provides:

> "Whenever any officer takes a child into custody, he shall, unless it is impracticable or has been otherwise ordered by the court, accept the written promise of the parent, guardian, or custodian to bring the child to court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Public Welfare, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court."

Title 11-914 provides:

> "If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other

court may exercise the powers conferred upon the juvenile court in this Act in conducting and disposing of such case."

Title 11-929(b) provides:

"The records made by officers of the court pursuant to sections 11-908 and 11-924, referred to in this section as social records, shall be withheld from indiscriminate public inspection, except that such records or parts thereof shall be made available by rule of court or special order of court to such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child, and to any court before which any such child may appear. The judge may also provide by rule or special order that any such person or agency may make or receive copies of such records or parts thereof. No person, agency, or institution which has received records or information under this section may publish or use them for any purpose other than that for which they were received."

Title 11-929(C) provides:

"It shall be unlawful for any person or persons to disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any information concerning any juvenile before the court, directly or indirectly derived from the records, papers, files, or communications of the court, or acquired in the course of the performance of official duties."

STATEMENT OF POINTS

1. The District Court was without jurisdiction insofar as waiver of the case by the Juvenile Court was substantively erroneous.

2. The District Court was also without jurisdiction because the waiver of jurisdiction by the Juvenile Court was not preceded by the "full investigation" which is the condition precedent to waiver.

3. The District Court was also without jurisdiction because waiver of jurisdiction by the Juvenile Court was founded upon denial to appellant of his right to inspection of the social service records of the Juvenile Court as well as effective assistance of counsel.

4. Assuming arguendo that the substantive error of the Juvenile Court in waiving the case, the inadequacy of the Juvenile Court investigation preliminary to waiver and the deprivation of appellant's constitutional rights while under the jurisdiction of the Juvenile Court do not appear beyond reasonable doubt from the pleadings and the subsequent testimony in the course of the trial in District Court, the District Court was under a duty to conduct an adequate and fair proceeding to permit it to resolve this question of fact. It was also under a duty to give fair and impartial consideration to the request to constitute itself a Juvenile Court. All this the District Court refused to do. It therefore proceeded to the trial of this case

without jurisdiction.

5. The District Court was further without jurisdiction of this case because it proceeded to trial after a hearing on the competency of the appellant in which appellant was denied any meaningful right to be heard. Moreover, independently of this procedural defect a finding of competency could not be deemed to be sustained under the facts of the record.

6. The District Court committed reversible plain error, affecting substantial rights, by admitting into evidence and permitting reference to fingerprints taken from appellant by the police while appellant was under the exclusive jurisdiction of the Juvenile Court.

7. The trial court committed reversible error when it failed and refused to grant judgmentof acquittal on all counts of the indictmenton the ground of insanity, and submitted the case to the jury, because there was not sufficient competent evidence offered by the prosecution to sustain its burden of proof beyond a reasonable doubt either (1) that the appellant had no mental disease or defect at the time he allegedly committed the criminal acts charged, or (2) that, although the accused was defective or diseased, said acts, if committed by him, were not the product of the affliction.

8. Pretermitting the legality of the use of fingerprints, it is plain that the evidence of identification by

fingerprints in the instant case was not sufficient to allow the conviction upon charges of housebreaking and robbery.

9. The trial court committed reversible plain error affecting the substantial rights of appellant when it gave the jury the so-called "Allen" or "dynamite" charge before the jury retired to consider its verdict.

SUMMARY OF ARGUMENT

I

Appellant, at the time of his arrest, was under the "exclusive jurisdiction" of the Juvenile Court.

Although a ward of that Court for two years, he had never been subjected to psychiatric examination and treatment. At the time of his waiver by the Juvenile Court, the Juvenile Court had in fact determined that he was a probable victim of mental illness. It was obvious in fact that his mental state had been neglected by the Juvenile Court.

The Juvenile Court moreover entered its order waiving jurisdiction, under the standards of Policy Memorandum No. 7. Insofar as these standards negate the corrective philosophy of the parens patriae plan of procedure by inviting waiver on the basis of the seriousness of the alleged offense and the prosecutive merit of the complaint -- contrary to the ruling of this Court that there can be no valid waiver where the purpose is that "of easing the docket"

or for a routine waiver "in certain classes of alleged crimes", they must be viewed as invalid. The waiver, therefore, was substantively erroneous.

II

Waiver of jurisdiction by the Juvenile Court took place in violation of the statutory requirement of a "full investigation" to determine whether waiver was proper. At no time had the Juvenile Court subjected appellant to a psychiatric examination to determine the nature of the probable mental illness which it had admitted or the prospects of appellant's rehabilitation under the auspices of the Juvenile Court with proper case.

III

In depriving appellant of assistance of counsel for a minimal period of two days, in subjecting him to unremitting police interrogation after his arrest, in violation of the Juvenile Court Law, in suffering his subjection to fingerprinting by the police during that period of illegal police detention, the Juvenile Court deprived appellant of the rights secured to him by both the Fifth and Sixth Amendments to the Constitution.

IV

By virtue of the foregoing the District Court was without jurisdiction in the instant case. Its lack of jurisdiction was enhanced by the fact that it refused to conduct proceedings to determine whether a valid waiver

had taken place and whether there was reason why it should constitute itself a Juvenile Court for the trial of the case. It was further enhanced by refusing to conduct a fair and adequate hearing to determine the mental competency of appellant to stand trial upon submission of the opinion of the D. C. General Hospital staff that appellant was incompetent.

V

Since the fingerprinting under the aegis of the Juvenile Court was illegal insofar as it violated the anonymity secured to the juvenile and since transmission of fingerprints or indeed of any other information derived in the course of the performance of official duties covering a juvenile was explicitly barred under the Juvenile Court Law, the District Court committed reversible plain error affecting substantial rights by admitting into evidence and permitting reference to fingerprints taken from appellant by the police while appellant was under the exclusive jurisdiction of the Juvenile Court.

VI

Eleven psychiatric and psychological expert witnesses testified for the defendant to the effect that appellant was of unsound mind and his crimes, if any, the product of a mental disease. Five lay witnesses, including a high school teacher and a psychiatric social worker testified to the effect that appellant's behavior had been seriously

abnormal. This evidence was supplemented by that of a Juvenile Court study showing appellant to have seriously deteriorated to the point where he was a probable victim of mental illness.

The evidence presented by the prosecution in rebuttal was minimal and patently unpersuasive. One psychiatrist testified that appellant was mentally ill. He then stated, solely on the basis of a hypothetical question which had no foundation in the evidence, that there seemed to be no causal connection between the appellant's illness and the alleged robberies. A second psychiatrist stated in conclusory form that appellant was without mental disease. Significantly, he declared that appellant was a victim of mental abnormality exemplified by varying forms of sexual perversions, lapses in bowel control and a hearing of voices which, however, he did not regard as clinically hallucinatory.

Neither reason nor fairness would allow of the conclusion that the government had excluded mental illness and its causal relationship with the crimes charged in this case beyond reasonable doubt.

VII

Since there was a failure of personal identification of appellant by complaining witnesses, the discovery of appellant's fingerprints on a table at the scene of an alleged crime did not constitute a rational basis for the

conclusion that he was in fact guilty of robbery and housebreaking.

VIII

The trial court committed reversible plain error affecting substantial rights of appellant when it gave the jury the so-called "Allen" or "dynamite" charge before the jury retired to consider its verdict. This charge gave the jury false notions of the validity and force of majority opinion; it prejudiced the right of the accused to a hung jury and a mis-trial by tending to stifle the dissenting voices of minority jurors; it went beyond the permissible limits to which a court may go in its endeavor to influence the jury towards the rendition of a verdict; it had, or was calculated to have the effect of coercing the jury into rendering a compromise verdict.

ARGUMENT

I

THE DISTRICT COURT WAS WITHOUT JURISDICTION INSOFAR AS WAIVER OF THE CASE BY THE JUVENILE COURT WAS SUBSTANTIVELY ERRONEOUS

A child falling under the jurisdiction of the Juvenile Court is regarded "as one whose individual welfare coincides with the well-being of the state and who is to be saved to it rather than prosecuted by it." The keynote of District of Columbia Juvenile Court legislation, as indeed is true of Juvenile Court legislation throughout the country, "is

one of protection and welfare rather than punishment and retribution." H. Rep. No. 177, 75th Cong., 1st Sess., 3 (1927).

The Juvenile Court operates under a parens patriae plan whose purpose is "to eliminate the formalities of a criminal proceeding which emphasizes 'punishment and retribution,' and to provide in its place a more informal procedure designed to enhance the protective and rehabilitative features which have come to be associated with modern juvenile courts"; the Juvenile Court is "to deal with children in an informal manner and to encourage dispositions, on the basis of all relevant social date, looking toward treatment rather than punishment." Shioutakon v. District of Columbia, 98 U.S. App. D.C. 371, 236 F. 2d 666, 668, 670 (1956). See also, D. C. Code, Sec. 11-902 (1951).[1/] In the words of this Court "the state assumes a position as parens patriae and cares for the child. Such a . . . (child) is not accused of a crime, not tried for

1/ The purpose of this chapter is to secure for each child under its jurisdiction such care and guidance, preferably in his own home, as will serve the child's welfare and the best interests of the state; to conserve and strengthen the child's family ties whenever possible, removing him from the custody of his parents only when his welfare or the safety and protection of the public cannot be adequately safeguarded without such removal; and, when such child is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents."

a crime, not convicted of a crime, not deemed to be a criminal, not punished as a criminal, and no public record is made of his alleged offense." Pee v. United States, 107 U.S. App. D.C. 47, 274 F. 2d 556, 558 (1959).

The right of waiver, significantly subject to full investigation -- a matter dealt with infra, is secured to the Juvenile Court. The basic presumption, however, is against waiver if the parens patriae plan is to be preserved. In this case waiver took place notwithstanding the following facts:

> 1 - The Juvenile Court had, at the time of waiver, admitted that appellant was a probable victim of mental illness.
>
> 2 - Appellant's illness had been clearly neglected by the Juvenile Court during the two years that appellant had been on probation under Juvenile Court auspices. In point of fact, uncontroverted testimony in the District Court trial showed that a relative of appellant had requested the Juvenile Court to accord appellant psychiatric treatment well before his arrest in instant case and that that request had been ignored.
>
> 3 - The Juvenile Court entered its order waiving jurisdiction under the standards of Policy Memorandum No. 7 -- which are invalid insofar as they negate the corrective philosophy of the parens patriae plan of procedure by inviting waiver on the basis of the seriousness of the alleged offense to the community and the prosecutive merit of the complaint -- contrary to the ruling of this Court that there can be no valid waiver where the purpose is that "of easing the docket" or for a routine waiver "in certain classes of alleged crimes." Green v. United States, _____U.S. App. D.C._____, _____F 2d_____ (1962). 1/

1/ Relevant portions of the Policy Memorandum have been set forth in their entirety in the Statement of Facts.

4 - Aside from the fact that such criteria of waiver, as set forth above, are invalid, the waiver in the instant case was violative of other criteria of waiver contained within Policy Memorandum No. 7, viz, "the sophistication and maturity of the juvenile." In the light of all of the uncontroverted evidence adduced in the adult trial of the boy in District Court -- including the evidence of the two expert witnesses for the prosecution, it is clear that the Juvenile Court waived jurisdiction of a 16-year-old boy who, at the very least, was "not normal" and whose emotional development was stunted to the point where he was suffering lapses in bowel control and engaging in transvestite activities at the time when he was waived by the Juvenile Court, presumably upon the assumption that he appeared mature enough to cope with both the stresses and complexities of trial in an adult court.

The conclusion is inevitable that the Juvenile Court, in effecting a waiver in this case, was proceeding in flagrant violation not only of the parens patriae plan incumbent on it under the Juvenile Court law but also of its own criterion of waiver - viz., the maturity of the person waived.

The need for corrective action by this Court is highlighted by the disparity in the procedure followed by the Juvenile Court in this case and its procedure in a case it decided on June 8, 1962. In Matter of Anonymous, 36-088-J (1962), the Juvenile Court, for the first time in its history, declared a juvenile charged with a criminal act not involved by reason of insanity and ordered his commitment to St. Elizabeths Hospital. Significantly, the Juvenile Court's action followed a stay of waiver pending the psychiatric examination of the juvenile -- an examination which

was not accorded to appellant in instant case under the auspices of the Juvenile Court. Upon receipt of psychiatric information substantially indistinguishable from that in the instant case, the Juvenile Court refused to waive jurisdiction. It "acquitted" the juvenile by reason of insanity, and then effected his commitment to St. Elizabeths Hospital until the Court's jurisdiction ended at age 21 or until the hospital pronounced him recovered and not dangerous, whichever came first.[1/]

It follows that the Juvenile Court waiver was erroneous as a matter of law.

II

THE DISTRICT COURT WAS ALSO WITHOUT JURISDICTION BECAUSE THE WAIVER OF JURISDICTION BY THE JUVENILE COURT WAS NOT PRECEDED BY THE "FULL INVESTIGATION" WHICH IS THE CONDITION PRECEDENT TO WAIVER

A child between 16 and 18 charged with an offense constituting a felony, or a child of any age charged with an offense punishable by death or life imprisonment, may

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1/ At the approach of age 21, if the juvenile has not recovered and should still be committed, the Juvenile Court as well as the public hospital could institute civil commitment proceedings pursuant to Title 21, Section 310, et. seq. of the D.C. Code.

See, Washington Post, June 9, 1962, p. A3:
"What is believed to be Juvenile Court's first acquittal by reason of insanity was won yesterday by a 14-yr.-old accused of slaying a classmate last Valentine's Day...Waiver to District Court for trial as an adult was weighted only at first when it thought that the killing might have been a cold blooded one... Last Month Dr. Rockland (of the D.C. General Hospital) explained that the effects of brain damage compounded by environmentally-caused schizophrenia, led the youth to revenge the world's harsh treatment of him by the act of murder...."

be tried as an adult accused of a crime, but only if after "full investigation" the Juvenile Court waives jurisdiction. D. C. Code, Sec. 11-914 (1951). That section provides in full that:

> "If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this Act in conducting and disposing of such case."

The necessity for an investigation which is truly "full" is emphasized by the disparity in the potential consequences to the child if he remains within the rehabilitative protection of the Juvenile Court or if he is relegated to adult criminal law. In this case, having been charged with rape, housebreaking and robbery, waiver of jurisdiction over appellant exposed him to the risk of punishment of "death by electrocution" and in fact resulted in the imposition of a ninety year term of imprisonment.

The statute "requires a 'full investigation.' That obviously means an inquiry not only into the facts of the alleged offense but also into the question whether the parens patriae plan of procedure is desirable and proper in the particular case." Pee v. United States, 107 U.S. App. D.C. 47, 274 F 2d 556, 559. Shioutakon v. District of

Columbia, 98 U.S. App. D.C. 371, 230 F 2d 666, 668, 670. See also, D.C. Code, Sec. 11-902 (1951). Exercise of the power of waiver must fit this purpose. It "permits the juvenile court to determine which children will be amenable to the treatment resources at its disposal and to transfer its jurisdiction in cases demanding such action" H. Rep. No. 242, 80th Cong. 1st Sess., 2 (1947) (emphasis supplied). An investigation to be "full" must therefore embrace all factors relevant to a determination by the Juvenile Court whether or not the child "will be amenable to the treatment resources at its disposal. . . ."

This Court in turn has held explicitly that "the waiver of Juvenile Court jurisdiction, upon which District jurisdiction attaches, depends upon a 'full investigation' by the Juvenile Court" Green v. United States, /U.S. App. D.C. F 2d_____ . It has said that "what is required before a waiver is . . . 'full investigation'". (Id.) And full investigation, it has stated "prevents the waiver of jurisdiction as a matter of routine for the purpose of easing the docket. It prevents routine waiver in certain classes of alleged crimes. It requires a judgment in each case based on 'an inquiry not only into the facts of the alleged offense but also into the question whether the parens patriae plan of procedure is desirable and proper in the particular case'" (Id.).

It would seem strangely inconsistent with the basic

philosophy of the Juvenile Court law if an investigation conducted by Juvenile Court were not to comprehend a psychiatric examination at least upon the presentation of some prima facie evidence of mental unsoundness. A number of state Juvenile Court statutes in fact have explicitly required a mental examination preliminary to waiver of jurisdiction. See, e.g., Sec. 2151.26, Page's Ohio Rev. Code Ann., providing that the full investigation in advance of waiver of jurisdiction by a Juvenile Court shall include "a mental and physical examination of such child . . . by the Bureau of Juvenile Research, or by some other public or private agency, or by a person qualified to make such examination. . . ." This specificity simply makes explicit what is clearly implicit in any Juvenile Court statute. Congress does not have less solicitude for the child and less enlightenment as to the need for an inquiry into mental health than does the Ohio Legislature.

An apt expression of Juvenile Court philosophy throughout the nation has been provided in these words:

> "The Children's Court, if it is to perform the high purposes for which it was created, to wit, the rehabilitation of children brought before it, and the salvation of child life, must take into consideration, not only the bare and apparent facts, but must go behind the facts and inquire as to the causative factors productive of those facts." In re XYZ, 24 N.Y.S. 2d 456.

The actual practice in the District of Columbia in the case of an adult charged with an offense makes the

uncontradicted allegation of the existence of a mental disorder, even when made by laymen, sufficient to warrant the granting of a mental examination in an adult proceeding. The duty of the Court under those circumstances is "to grant the motion and order appropriate "mental examination . . ." See, e.g., Lloyd v. United States, 101 U.S. App. D.C. 110, 247 F 2d 522.

Yet in this case the Juvenile Court spurned information on the vital subject of appellant's mental health and at no time proceeded to make its own independent determination as to the nature of the mental illness which it itself admitted was probable. An uncontroverted affidavit of a psychiatric expert submitted by appellant, had informed the Juvenile Court that appellant was a victim of severe psychopathology and that a complete investigation of the psychological and social factors of his case was impossible without placing him in a hospital situation for psychiatric observation. Such an examination was feasible. The Juvenile Court was informed, and this Court may judicially notice, that "adequate psychiatric facilities in the handling of . . . (Appellant were) available to the Juvenile Court in the D. C. General Hospital, which has an inpatient department specializing in the care of children and adolescents." (See motion to dismiss indictment and accompanying affidavits.) Thus the Juvenile Court was apprised of the need for and the availability of a careful

inquiry into appellant's mental health. Without it the Court could not have received responsible and reliable information as to either the appellant's then existing state of mental health or as to the prospect of his rehabilitation with proper care. Yet no such inquiry was conducted.

In point of fact, to this day there has been no inquiry as to the prospects of appellant's rehabilitation with proper care, a subject crucial to a rational determination as to his waiver by the Juvenile Court.

It follows that the District Court was without jurisdiction.

III

THE DISTRICT COURT WAS ALSO WITHOUT JURISDICTION BECAUSE WAIVER OF JURISDICTION BY THE JUVENILE COURT WAS FOUNDED UPON DENIAL TO APPELLANT OF HIS RIGHT TO DUE PROCESS, INCLUDING THE RIGHT TO INSPECTION OF THE SOCIAL SERVICE RECORDS OF THE JUVENILE COURT AS WELL AS EFFECTIVE ASSISTANCE OF COUNSEL.

Were the inquiry conducted by the Juvenile Court in this case thought to satisfy the statutory standard of full investigation, it would offend the constitutional standard of fundamental fairness.[1/]

1/ The mere confinement of appellant under the aegis of the Juvenile Court for a period of almost one week without arraignment is offensive to ordered liberty. Mr. Justice Frankfurter, speaking for the Supreme Court in Culombe v. Conn., 367 U.S. 568, 584-5, fn. 26 (1961), declared that it was fair to say that there was "unanimity for the proposition" championed by the Committee on the Bill of Rights of the American Bar Assoc. that "strict observance of some reasonably definite and rather short time limit for the detention of a prisoner after arrest without judicial sanction is vital to personal liberty. (Emphasis supplied.)

Unless granted effective assistance of counsel at the time when waiver is considered in Juvenile Court, an accused juvenile loses irretrievably any defense he may have against an improvident or improper waiver. See D.C. Code, Title 11-914. If, therefore, the benefits of a full investigation cannot be secured by zealous counsel at the Juvenile Court stage, the rights of the appellant as a juvenile are irreparably compromised.

If "the right to be heard . . . requires the effective assistance of counsel in a Juvenile Court" -- even when no more significant a deprivation than placing a child upon probation is threatened -- how much more is effective assistance of counsel needed as part of the "right to be heard" when the action of the Juvenile Court by waiver of jurisdiction may threaten the very life of the child itself. Cf. Shioutakon v. District of Columbia, 98 U.S. App. D.C. 371, 236 F 2d 666 (1956).

Appellant's counsel sought but did not secure the social records in the court's possession. Without the records he could not know what data were before the court. He therefore could not know what to supply, explain or refute. As he informed the Juvenile Court, if counsel "is denied access to the Social Service file and, particularly, to the psychological test results, which, if disclosed, he intends to submit to the scrutiny of appropriate experts available to him, . . . (appellant) will be denied effective

assistance of counsel".

The Court was duty bound to make the social records available to counsel. D.C. Code Sec. 11-929(b) (Supp. VIII, 1980), directs that:

> "The records made by officers of the court pursuant to sections 11-908 and 11-924, referred to in this section as social records, shall be withheld from indiscriminate public inspection, except that such records or parts thereof shall be made available by rule of court or special order of court to such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child, and to any court before which any such child may appear. The judge may also provide by rule or special order that any such person or agency may make or receive copies of such records or parts thereof. No person, agency, or institution which has received records or information under this section may publish or use them for any purpose other than that for which they were received."

To furnish the records to counsel is of course not to exhibit them to "indiscriminate public inspection." On the contrary, it is to supply them precisely to the person to whom the statute mandates disclosure, namely, the records "shall be made available by rule of court or special order of court to such persons . . . as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child . . ." (Emphasis supplied.) The child's counsel is just such a person.[1/]

1/ The requirement of disclosure was added by an amendment enacted in June 12, 1952, 66 Stat. 134, for the very purpose of removing the seal of secrecy when the records were sought by those having a legitimate interest in them. H.Rep. No.1937, 82d Cong., 2d Sess. (1952); S. Rep..No. 1195, 82d Cong., 2d Sess. (1952); 98 Cong. Rec. 1305. There can of course be no doubt as to the legitimate interest of the child's counsel.

It is equally clear moreover that during two days of interrogation and fingerprinting at police headquarters appellant was without any assistance of counsel whatsoever and that as a consequence of such lack of assistance he furnished evidence against himself. It must be reiterated in this context that when counsel was retained for appellant in the Juvenile Court during the second day of appellant's interrogation at police headquarters, counsel was not informed that his client could be found in any place other than the Receiving Home for Children by the Social Service Director of the Juvenile Court who, in fact, handed him a brouchure providing directions as to how to reach the Receiving Home. We now know that during this period of interrogation "a confession" was extracted from appellant. While the confession itself was suppressed, it is now clear that much of the prosecution cross-examination of defense psychiatrists was founded upon data obtainable with that "confession" alone. We now also know that appellant was fingerprinted at police headquarters and that such fingerprints were ultimately used against him in the District Court.

The fingerprinting of a child is blatantly inconsistent with the purposes of a Juvenile Court law, explicitly

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1a Compare S. Rep. No. 530, 75th Cong., 1st Sess., 4 (1937); "Privacy of hearings is provided, but the definition of privacy does not exclude any person having a legitimate interest in the case, including legal counsel. The public in general, and morbid curiousity seekers in particular, alone are excluded.

designed to prevent the creation of any manner of record against the child. Congress as well as this Court have explicitly recognized that "no public record" may be made of a child's contact with the Juvenile Court. See, e.g., Pee v. United States, 107 U.S. App. D.C. 47, 49, 274 F 2d 556, 558 (1959).

D.C. Code Ann. Title 11-929(c) declares beyond any possibility of misunderstanding:

> "It shall be unlawful for any person or persons to disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any information concerning any juvenile before the court, directly or indirectly derived from the records, papers, files, or communications of the court, or acquired in the course of the performance of official duties." (Emphasis supplied).

It must be pointed out, moreover, that in this case fingerprinting was the direct result of the lawlessness of the police in the treatment of appellant.

D.C. Code Ann. Title 11-912, governing the arrest of a juvenile provides as follows:

> "Whenever any officer takes a child into custody, he shall, unless it is impracticalbe or has been otherwise ordered by the court, accept the written promise of the parent, guardian, or custodian to bring the child to court at the time fixed. Thereupon such child may be released in the custody of a parent, guardian, or custodian. If not so released, such child shall be placed in the custody of a probation officer or other person designated by the court, or taken immediately to the court or to a place of detention provided by the Board of Public Welfare, and the officer taking him shall immediately notify the court and shall file a petition when directed to do so by the court."

Appellant, after his arrest, was not brought before a probation officer or any other person designated by the statute. He was brought to police headquarters for interrogation and fingerprinting. He was held incommunicado.

It follows therefore that fingerprinting, illegal per se, was also the fruit or the lawlessness of police activities. What, however, the presence of counsel could have prevented was obtained by secret inquisatorial practices.

The situation was one in which appellant was "made the deluded instrument of his own conviction." HAWKINS, PLEAS OF THE CROWN 595 (8th Ed., 1824).

In Crooker v. California, 357 U.S. 433 (1958), Mr. Justice Clark, speaking for the Supreme Court, declared as follows:

> "Refusal of request to engage counsel violates due process not only if the accused is deprived of counsel at trial on the merits... but also if he is deprived of counsel for any part of the pre-trial proceedings, provided that he is so prejudiced thereby as to affect his subsequent trial with an absence of 'that fundamental fairness essential to the very concept of justice.'" (Id., 439)

In that case the Supreme Court held a petitioner in a state criminal proceeding not to be deprived of due process of law merely as the result of the denial of access to counsel for a period of fourteen hours while in police custody. The petitioner in that case, in marked contrast to appellant in instant one, had been a law student and

had shown markedly high intellectual endowment. Mr. Justice Douglas, joined by the Chief Justice and Justices Black and Brennan in a separate opinion in this case, underscored the fundamental point of the majority, to wit, that the right to counsel was not a right confined to representation during the trial on the merits but that it extended to every phase of pre-trial proceedings. As expressed by Mr. Justice Douglas:

> "If at any time, from the time of his arrest to final determination of his guilt or innocence an accused really needs the help of an attorney, it is in the pre-trial period . . . Indeed, the pre-trial period is so full of hazards for the accused that, if unaided by competent legal advice, he may lose any legitimate defense he may have long before he is arraigned and put on trial." (Id., 445-446)

However, one need not concern oneself with the specific degree of prejudice arising out of the loss of counsel in this case although the prejudice in this case is overwhelming.

These are proceedings subject to review by federal as distinct from state standards governing the right to assistance of counsel. And the federal courts may not be permitted "to engage in nice calculations as to the amount of prejudice actually done where loss of assistance of counsel at any stage is actually shown to have taken place." See Glasser v. United States, 315 U.S. 60, 76 (1942).

IV

ASSUMING ARGUENDO THAT THE SUBSTANTIVE ERROR OF THE JUVENILE COURT IN WAIVING THE CASE, THE INADEQUACY OF THE JUVENILE COURT INVESTIGATION PRELIMINARY TO WAIVER AND THE DEPRIVATION OF APPELLANT'S CONSTITUTIONAL RIGHTS WHILE UNDER THE JURISDICTION OF THE JUVENILE COURT DO NOT APPEAR BEYOND REASONABLE DOUBT FROM THE PLEADINGS AND THE SUBSEQUENT TESTIMONY IN THE COURSE OF THE TRIAL IN DISTRICT COURT, THE DISTRICT COURT WAS UNDER A DUTY TO CONDUCT AN ADEQUATE AND FAIR PROCEEDING TO PERMIT IT TO RESOLVE THIS QUESTION OF FACT. IT WAS ALSO UNDER A DUTY TO GIVE FAIR AND IMPARTIAL CONSIDERATION TO THE REQUEST TO CONSTITUTE ITSELF A JUVENILE COURT. ALL THIS THE DISTRICT COURT REFUSED TO DO. IT THEREFORE PROCEEDED TO THE TRIAL OF THIS CASE WITHOUT JURISDICTION.

This Court's decision in Green v. United States, ____ App. D.C.____, F 2d _____, has definitively determined that the sufficiency of the Juvenile Court's investigation is open to judicial review. As stated in Green, "If it is appellant's contention that the Juvenile Court failed to make the 'full investigation' required by the statute, he is free to make that contention to the District Court upon our remand. That court, upon sufficient allegations, should conduct such proceedings as may be necessary to determine whether 'full investigation' was made by the Juvenile Court. . . ." (sl. op. p. 5).

Acting with reference to the facts of this particular case -- though seemingly without full knowledge of the content of all of the uncontroverted affidavits filed therein -- this Court declared that "proceedings to determine

whether 'full investigation' was made by the Juvenile Court were available upon a motion to dismiss the indictment in the District Court upon 'sufficient allegations.'" Kent v. Reid and Kent v. District of Columbia, _____U.S. App. D.C._____, _____F 2d _____(1963).

Such a motion, supported by uncontroverted affidavits, had been filed in the District Court.

The District Court summarily denied that motion, spurning offers of proof based upon the affidavits in question.

This court also declared in the two companion cases, supra, that appellant was free to request the District Court to constitute itself a juvenile court. A motion to have the District Court act in this capacity was again summarily denied -- the words of Chief Judge McGuire -- "with emphasis."

The pervasive lack of procedural fairness in the treatment of all of the motions addressed to it upon this score was displayed by the District Court not only in denying the appellant an opportunity of establishing his contention that there had been an improper waiver by the Juvenile Court but also in the manner in which this denial took place -- as set forth in the Statement of the Case.

V

THE DISTRICT COURT WAS FURTHER WITHOUT JURISDICTION OF THIS CASE BECAUSE IT PROCEEDED TO TRIAL AFTER A HEARING ON THE COMPETENCY OF THE APPELLANT IN WHICH APPELLANT WAS DENIED ANY MEANINGFUL RIGHT TO BE HEARD. MOREOVER, INDEPENDENTLY OF THIS PROCEDURAL DEFECT A FINDING OF COMPETENCY COULD NOT BE DEEMED TO BE SUSTAINED UNDER THE FACTS OF THE RECORD.

Appellant, it will be recalled, was denied an opportunity of having the finding of mental incompetency by the D. C. General Hospital brought up to date.

Moreover, Dr. Warren C. Johnson, appellant's expert witness, seeking to examine the appellant at the request of counsel, was refused admission to the District Jail. St. Elizabeths psychiatrists, secured by the government, were under no such handicap.

Appellant was therefore denied the rudimentary rights essential to due process in any hearing in which no more than the dispostion of property is involved. See, e.g., Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950); Ohio Bell Telephone Co. v. Public Utilities Comm., 301 U.S. 292 (1937).

Aside from this, however, the psychiatric testimony presented by the government was squarely in conflict. One psychiatrist testified that appellant's recollection of events touching the period of the indictment was defective, another testified to the contrary, although both asserted in conclusory terms that appellant was competent. This

was countered by the testimony of appellant's counsel that he had never succeeded in maintaining rational communication with his client. A finding of competency cannot be sustained in the face of this record.[1/]

In this context, moreover, the District Court proceeded upon the assumption that medical testimony as to competency was to be given a conclusive effect. This assumption cannot be squared with the case law of this Court, which explicitly declares the contrary. Gunther v. United States, 94 U.S. App. D.C. 243, 246, 215 F 2d 493 (1954).

VI

THE DISTRICT COURT COMMITTED REVERSIBLE PLAIN ERROR, AFFECTING SUBSTANTIAL RIGHTS, BY ADMITTING INTO EVIDENCE AND PERMITTING REFERENCE TO FINGERPRINTS TAKEN FROM APPELLANT BY THE POLICE WHILE APPELLANT WAS UNDER THE EXCLUSIVE JURISDICTION OF THE JUVENILE COURT.

The fingerprinting of the appellant by the police took place on two occasions while appellant was a ward of the Juvenile Court -- once two years before -- the second time immediately after the arrest in the instant case. On each occasion appellant -- held without legal representation--

1/ The record as previously noted also contains the sworn statements of two counsel working for the defense, in addition to the testimony of Mr. Sandground, that rational communications between counsel and appellant was impossible.

was under the "exclusive jurisdiction" of the Juvenile Court.

A juvenile, subject to the exclusive jurisdiction of the Juvenile Court, is assured of anonymity as a general condition of the constitutionality of all phases of the Juvenile Court proceeding. See, e.g., Pee v. United States, 107 U.S. App. D.C. 47, 49, 274 F 2d 556, 558 (1959).

The fingerprinting of a juvenile under the aegis of the Juvenile Court destroys the anonymity secured to him under law without compensating him for such loss or for that of the traditional constitutional safeguards available under the adult law.

Since the constitutionality of Juvenile Court proceedings -- devoid of any of the safeguards secured to the adult under the Constitution is expressly dependent on their non-punitive character -- including maintenance of the anonymity of the child -- destruction of such anonymity renders such proceedings constitutionally defective ab initio.

Beyond this, the fingerprinting of a juvenile is repugnant to the avowed purpose of the Juvenile Court law--which is to prevent the stigmatization of the child through the creation of any manner of public record. See, e.g., Pee v. United States, 107 U.S. App. D.C. 47, 49, 274 F 2d 556, 558 (1959).

One cannot conceive of the creation of any more

definite and damaging a record -- from the standpoint of the future welfare of the child -- than the fingerprinting of such child and the inclusion of such fingerprints within the criminal files of the Police Department. As a matter of cold, practical fact, such fingerprinting rivets to the child at the least a record suspicion of criminality -- which continues to attach to it through youth and indeed for the balance of his adult life.

It follows that upon this score alone the use of fingerprints in the adult proceedings in District Court constituted reversible plain error as the use of evidence subversive of the protective scheme of the Juvenile Court law.

Even if the fingerprinting in the instant case be viewed as not explicitly barred under law -- for purposes of argument -- the disclosure of such fingerprints in District Court or elsewhere is barred under the express mandate of the Juvenile Court law. It must be recalled that these fingerprints were taken while appellant was under the exclusive jurisdiction of the Juvenile Court -- either as information which was part and parcel of the juvenile's files or otherwise "in the course of the performance of official duties." On this point the statute is explicit. The disclosure of fingerprints as part of any information concerning the juvenile which is "directly or indirectly derived" from the "records, papers, files, or

communications of the (Juvenile) court or (which is) acquired in the course of the performance of official duties" is expressly prohibited under the Juvenile Court law. D.C. Code Ann. Title 11-929(c). (Emphasis supplied) Such disclosure, moreover, is punishable by fine and/or imprisonment. Ibid.

The Juvenile Court has never engaged in the fingerprinting of juveniles under its jurisdiction. Were it to have done so -- it would have violated the inherent purpose of the Juvenile Court law. Had it acquired such fingerprints by any manner or means or from any source it would be explicitly barred by statute from transmitting or disclosing them on any level. D.C. Code Ann. Title 11-929 (c). Congress has not intended to provide the police with authority it has explicitly denied the Juvenile Court. It is self-evident that insofar as the action of the police in the instant case had any color of authority it was derived from the authority of the Juvenile Court law. Under that law the use of such fingerprints in District Court under the facts of this case was plainly illegal.

Both instances of fingerprinting of appellant moreover are also subject to a further taint of illegality. The fingerprints were obtained in the course of the detention of appellant by police -- without the authority of the Juvenile Court -- in the face of the statutory command that such a juvenile upon arrest be placed within the

custody of designated persons, not including the police. D.C. Code Ann. Title 11-912.

Without the benefit of any statutory prohibition, this Court has held fingerprints obtained in the course of an illegal arrest and detention subject to exclusion in the District Court. As expressed by this Court:

> "True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arresting person to yield to them during illegal detention. If one such product of illegal detention is proscribed, by the same token all should be proscribed." Bynum v. United States, 104 U.S. App. D.C. 368, 370, 262 F 2d 465 (1958).

It follows that the District Court erred in admitting the fingerprints and permitting reference to them.

The extensive character of the violation of both constitutional and statutory rights of the juvenile through his fingerprinting and the subsequent use of his fingerprints to secure his conviction in District Court requires reversal as plain error affecting substantial rights. Rule 52(b) F.R. Cr. P. Cf. Mapp v. Ohio, 367 U.S. 743, Weems v. United States, 217 U.S. 349.

VII

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED AND REFUSED TO GRANT JUDGMENT OF ACQUITTAL ON ALL COUNTS ESPECIALLY ON THE GROUND OF INSANITY, AND IN SUBMITTING THE CASE TO THE JURY, BECAUSE THERE WAS NOT SUFFICIENT COMPETENT EVIDENCE OFFERED BY THE PROSECUTION TO SUSTAIN ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT EITHER (1) THAT THE APPELLANT HAD NO MENTAL DISEASE OR DEFECT AT THE TIME HE ALLEGEDLY COMMITTED THE CRIMINAL ACTS CHARGED, OR (2) THAT, ALTHOUGH THE ACCUSED WAS DEFECTIVE OR DISEASED, SAID ACTS, IF COMMITTED BY HIM, WERE NOT THE PRODUCT OF THE AFFLICTION.

In Durham v. U.S., 94 U.S. App. D.C. 228, this Court defined mental "disease" as follows:

> "We use "disease" in the sense of a condition which is considered capable of either improving or deteriorating."

On December 22, 1961 the D. C. General Hospital submitted their official report to the Court regarding the defendant's mental condition, which stated in part that appellant was admitted on October 17, 1961 for mental observation and:

> "Morris has been here for almost 60 days. During that time he has been seen by many psychiatrists, has taken part in a diagnostic study, including psychologicals, electroencephalogram, and projective tests involving art materials. In addition there has been constant supervision of his activities by nurses, attendants, and students all of whom are trained observers. There have been a series of staff conferences concerning all of the issues. . . . It is the consensus of the staff that Morris is emotionally ill and severely so. In view of the many facets of his behavior we feel that he is incompetent to stand trial. . . . Indeed he has a mental illness of the schizophrenic type. . . . During the time he committed the crimes his

condition seemed to be a psychotic one. . ."

On April 6, 1962 St. Elizabeths Hospital submitted their official report to the Court regarding the appellant's mental condition, which stated in part that appellant was admitted on January 8, 1962 for a report regarding his mental condition and:

> "Mr. Kent's case has been studied since the date of his admission to Saint Elizabeths Hospital and he has been examined by qualified psychiatrists of the mental staff of this hospital as to his mental condition. On April 4, 1962, Mr. Kent was examined and his case reviewed in detail at a medical staff conference. . . . It is our opinion that he is suffering from mental disease at the present time, Schizophrenic Reaction, Chronic Undifferentiated Type; that he was suffering from this mental disease on or about June 5 and 12, and September 2, 1961; and the criminal acts with which he is charged, if committed by him, were the product of this disease."

At the trial, the following expert witnesses testified for the defense that from their examinations of appellant it was their opinion that at the times of the alleged commission of the offenses charged, he was suffering from a mental disease, and the offenses if committed by him, were the product of such disease. The employment of such witnesses and their opinions of the nature of appellant's said mental disease are:

> Dr. Katherine Beardsley, clinical psychologist
> St. Elizabeths Hospital - "Chronic Undifferentiated schizophrenia" (T 255)
>
> Dr. Mauris M. Platkin, psychiatrist
> St. Elizabeths Hospital - "Schizophrenic reaction,

chronic undifferentiated type" (T 300)

Dr. William Novak, clinical director of psychiatry D. C. General Hospital - "schizophrenic reaction, undifferentiated type" (T 350) (also periodic psychotic episodes)

Dr. John Lawrence Endacott, Asst. Chief Clinical Psychologist Veterans Administration - "schizophrenia, undifferentiated type" (T 379)

Dr. Malcolm Meltzer, clinical psychologist Veterans Hospital, Durham, North Carolina and Duke University- "schizophrenic reaction and times of psychosis (T 446)

Dr. Dorothy A. Dobbs, psychiatrist St. Elizabeths Hospital - "schizophrenic reaction, chronic undifferentiated type-psychosis" (T 474)

Dr. Warren Charles Johnson, psychiatrist in private practice - "schizophrenia" (T 521-522)

Dr. Bernard Levy, Director, Psychological services, D. C. General Hospital and assistant professor of psychology and psychiatry, Georgetown University - "a psychotic condition, schizophrenia, undetermined type" (T 563)

"By stipulation" -- Dr. William Hamman, staff psychiatrist St. Elizabeths Hospital - "schizophrenia, undifferentiated type" (T 601)

Dr. James A. Ryan, staff psychiatrist D. C. General Hospital - "schizophrenia undifferentiated type" (T 601)

Dr. Charles E. Goshen, Associate Professor of Psychiatry, W. Va. University - "schizophrenia, chronic undifferentiated type, a psychosis (T 635)

The following lay witnesses for the defense gave evidence of appellant's abnormal conduct which substantially affected his mental and emotional processes and behavior controls prior to his arrest:

Mrs. Courtney T. Kent - defendant's mother (T 217)

Mr. Thomas C. Cope - defendant's uncle and high school teacher (T 241)

Mr. John Richard Kavanagh - Public Welfare Specialist Department of H.E.W. (T 486)

Mrs. Cornelia Dawson -defendant's aunt (T 602)

Mrs. Thomas Cope -defendant's aunt (T 607)

To the above effect, there was also introduced into evidence, a Juvenile Court Social Study of appellant, (T 627-628).

The testimony of the lay witnesses was strong in its indication of defendant's abnormality. Two of the lay witnesses were trained in this or related fields and such testimony is of great value.

The prosecution offered the testimony of two expert witnesses in rebuttal to sustain its burden of proof beyond a reasonable doubt either (1) that the accused had no mental disease or defect or (2) that, although the accused was defective or diseased, his act was not the product of the affliction. To sustain this burden it called Dr. David J. Owens and Dr. John R. Kavanagh. On the first issue Dr. Owens testified that the defendant was suffering from a mental disease on the date of the alleged commission of the acts charged against him, "schizophrenic reaction, chronic undifferentiated type" (T 672). On this issue Dr. Kavanagh testified substantially as follows:

"I decided that he did not have a mental disease" (T 690). However, this witness also testified the defendant was suffering from a "form of sexual perversion

and transvestism" (T 700); that the defendant had a nervous manifestation, "sometimes referred to as an irritable or spastic colon" (T 701); that the defendant had schizoid tendencies (T 702); that "I hope I haven't given that impression" that defendant is a normal individual (T 704); that defendant has a schizoid personality (T 705); that in his opinion a personality disorder in which the schizoid personality would be included does not represent a disease in either the terminology used by the Court or the terminology used by psychiatrists (T 706); that the defendant's withdrawal during the examination of him by witness "was one of the manifestations of the symptoms of schizophrenia" (T 708); that some things done by defendant constitute a form of sexual perversion and "it would come in the classification of sociopathic personality disturbances in which sexual perversion is a sub-variety. So it is my opinion it would be evidence of a personality disorder rather than a disease" (T 710); that he is familiar with the Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association and personality disorder was a valid classification of mental diseases and disorders when listed in said Manual (T 710); (Such personality disorders are in fact listed as mental disorders within that Manual.) that other conduct exhibited by defendant is also evidence of a personality disorder (T 711); that "It is my feeling that in my examination

I did not find anything more than a schizoid personality and granted perhaps a schizoid personality may go ahead and become schizophrenic, I found no evidence of schizophrenia" (T 718); that he would classify the schizoid personality as a personality disorder (T 719); that it is so classified in the Statistical Manual (T 705); that the psychological tests given appellant by Dr. Bernard Levy (who testified for defense) indicated that the defendant was suffering from schizophrenia, undifferentiated type (T 725).

Durham, supra, also states the jury question to be:

> "The question will be simply whether the accused acted because of a mental disorder, and not whether he displayed particular symptoms which medical science has long recognized do not necessarily, or even typically, accompany the most serious mental disorder." (Emphasis supplied.)

In view of the foregoing, it is submitted that the prosecution failed to establish beyond a reasonable doubt that the appellant had no mental disease or defect at the times of the alleged commission of the offenses charged, which includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. See McDonald v. U. S., _____ U.S. App. D.C. _____ decided October 8, 1962.

To sustain its burden of proof beyond a reasonable doubt on the issue that, although the accused was defective or diseased, his alleged acts were not the product of

his affliction, the prosecution produced the testimony of only one witness, Dr. Owens, supra, to rebut the testimony of the defense.

In answer to hypothetical questions not based upon admitted facts or upon facts disclosed in the record asked by the prosecutor this witness gave conflicting testimony with reference to productivity with relation to the robbery counts. The questions were based on the assumption that the appellant allegedly first committed robbery in each of the premises prior to committing the alleged assaults. These do not appear to be the facts as disclosed in the record, and therefore such testimony is of no value and inadmissible. As stated by this Court in Winn v. U.S., 106 U.S. App. D.C. 133:

> "Opinion evidence, to be of any value, should be based either upon admitted facts or upon facts, within the knowledge of the witness, disclosed in the record. Opinion evidence that does not appear to be based on disclosed facts is of little or no value." (See cases cited therein)

The witness was asked the improper hypothetical questions four times (robbery first) and his answer the first time regarding the alleged Echols robbery was "assuming the information that you gave me, I would say that schizophrenia was not -- did not cause the robbery itself" and "I would have no opinion about the housebreaking" (T 674); in answer to the improper question regarding the alleged Palmer robbery, the witness answered "Probably not";

in answer to the improper question regarding the alleged Murphy robbery, the witness answered "The robbery was probably not, assuming the information that you gave me" (T 676). In answer to the same improper questions asked the second time by the prosecutor of this witness regarding all three alleged robberies, the witness testified "If the primary motivation were robbery or to get something to eat, then this would not be connected with the sexual preoccupation which was in turn a symptom of his illness. This is the reason that I have difficulty in arriving at a firm opinion as to the productivity" (T 678); the witness answered the hypothetical improper question regarding the three alleged robberies asked by the prosecutor for the third time by testifying "I would say his primary motivation was robbery. Because this is the first thing that he did. It is very simply and I can answer this is what he did first. This is assuming that this is correct, his motivation was accomplished by his first act when he entered" (T 680). On cross-examination the witness testified on the productivity regarding the robbery counts "I think my opinion is still that I don't have a firm opinion one way or the other." (T 683). On redirect the prosecutor was permitted by the Court to ask the improper hypothetical question regarding the robberies of this witness for the fourth time and he testified "I would say that from the information that you have just given, if this is correct,

then I cannot see a connection between a robbery and his illness" (T 388).

It should be noted that the prosecutor aggravated this situation by twice stating to the jury in his arguments that three robberies occurred prior to the assaults.

As an expert witness, this witness is permitted to testify to his inference from facts. His opinions are what is sought. And these opinions must be based upon facts he has himself observed, or facts he has heard others relate, or hypothetical facts presented to him. His purpose is to give educated conclusions based upon fact. Blunt v. U.S., 100 U.S. App. D.C. 266.

It seems obvious that the opinions given by this witness regarding productivity on the robbery counts was of no value and inadmissible because it does not appear to be based upon admitted facts or upon facts within his knowledge disclosed in the record. These opinions were not admissible in evidence for the same reason.

It must be argued that even if these opinions on the robbery counts were based upon facts disclosed in the record, they were not sufficient to sustain the Government's burden of proof.

It must further be obvious that this witness did not rebut or attempt to rebut the productivity regarding the housebreaking counts in any substantial manner.

The judgment in this case must be set aside. It seems

clear beyond question that at the close of all the competent evidence a reasonable mind must necessarily have had a reasonable doubt as to the sanity of accused at the times the alleged acts were committed, and that if said acts were committed by him, they were the product of his mental disease. The trial judge should therefore at the conclusion of the case have directed a judgment of acquittal by reason of insanity. Isaac v. U.S., 109 U.S. App. D.C. 34; Curley v. U.S., 81 U.S. App. D.C. 389.

VIII

PRETERMITTING THE LEGALITY OF THE USE OF FINGERPRINTS, IT IS PLAIN THAT THE EVIDENCE OF IDENTIFICATION BY FINGERPRINTS IN THE INSTANT CASE WAS NOT SUFFICIENT TO ALLOW THE CONVICTION UPON CHARGES OF HOUSEBREAKING AND ROBBERY.

In the light of the failure of the personal identification of appellant by complaining witnesses, the discovery of appellant's fingerprints on a table does not afford a rational basis for the conclusion that appellant had in fact been guilty of the crimes of robbery and housebreaking. Absent a rational basis for such conclusion, the conviction lacks constitutional validity. Cf. Tot v. United States, 319 U.S. 463 (1943).

The case of State v. Minton, 228 N.C. 518, 46 S.E. 2d 296 (1948) is directly apposite.

There the defendant had been charged with breaking and entering, as well as larceny. He had been a customer

in the bar in which the alleged crime had taken place on the night of the alleged crime and had, in fact, been seen standing outside the bar when the proprietor had locked up. Evidence at the trial showed that there had been an entry by breaking the glass in the top panel of the door. Two quarters had been shown stolen from the cash drawer. The portion of the window which had been knocked out contained the fingerprint of the left thumb of the defendant, who was right-handed. The defendant was arrested at home in bed and two quarters were found on his dresser and his palm was cut. He claimed to have been in bed at midnight, the time of the robbery. Upon conviction, the Supreme Court of North Carolina reversed, holding the circumstantial evidence <u>including</u> the fingerprints insufficient to support a conviction. As expressed by the Court:

> "The State relies entirely on circumstantial evidence. It is an established principle in the administration of criminal law that circumstantial evidence is insufficient to sustain a conviction unless the circumstantial facts shown on the hearing are 'of such a nature and so connected or related as to point unerringly to the defendant's guilt and exclude any other reasonable hypothesis.'
>
> "The fact that fingerprints corresponding to those of an accused are found in a place where a crime was committed is without probative force unless the circumstances are such that the fingerprints could only have been impressed at the time when the crime was perpetrated.
>
> "The circumstances relied on by the State are inconclusive and do not lead to a satisfactory deduction that the accused, and no one else,

perpetrated the crime alleged in this action. All of these circumstances can be true, and the defendant can still be innocent." 46 S.E. 2d 297-298.

IX

THE TRIAL COURT COMMITTED REVERSIBLE PLAIN ERROR AFFECTING THE SUBSTANTIAL RIGHTS OF APPELLANT WHEN IT GAVE THE JURY THE SO-CALLED "ALLEN" OR "DYNAMITE" CHARGE BEFORE THE JURY RETIRED TO CONSIDER ITS VERDICT.

It must be remembered that a principal defense to all the counts in the indictment was insanity, and it appears from the verdict of not guilty by reasons of insanity on two counts and guilty on the other six counts, that the jury rendered a compromise verdict.

It must further be remembered that in Allen the charge was given to the jury after the main charge was delivered, and when the jury had returned to the Court apparently for further instruction. No brief was filed on behalf of Allen in the Supreme Court. Allen v. U.S., 164 U.S. 492.

The charge given here went beyond the "Allen" charge. Here, the trial court gave to the jury before it retired to consider its verdict the substance of the Allen charge plus the Supreme Court's comments on this instruction, and further added "It is your duty to decide this case if you can conscientiously do so."

The trial court here was not authorized to tell the jury, at any stage of the trial, that they must agree or agree by compromise. This peremptory order to arrive at a

verdict is logically inferred from the charge, and is plain coercion and an invasion by the Court of the province of the jury. The charge also expressly or impliedly suggested that the jury compromise in order to arrive at an agreement.

All of this resulted in an improper direction or coercion by the trial court, and for this reason alone the verdict must be vacated on this appeal.

As stated in Green v. United States, 309 F 2d 852:

> "The Allen or 'dynamite' charge is designed to blast loose a deadlocked jury. . . This is the outermost limits of its permissible use. The jury system rests in good part on the assumption that the jurors should deliberate patiently and long, if necessary, and arrive at a verdict--if, but only if, they can do so conscientiously. It is improper for the Court to interfere with the jury by pressuring a minority of the jurors to sacrifice their conscientious scruples for the sake of reaching agreement."

In Powell v. United States, 297 F 2d 318, 321, the Court said:

> "It is implicit in the decisions of the Supreme Court dealing with the Allen case, e.g., Burton v. United States, 196 U.S. 283, 25 S.Ct. 243, 49 L.Ed. 482, and Brasfield v. United States, 1926, 272 U.S. 448, 47 S.Ct. 135, (71 L.Ed. 345) that the Fourth Circuit was correct in its recent holding (In United States v. Rogers, 1961, 289 F 2d, 433, 435-37) 'that the Allen charge, itself, approaches ultimate permissible limits * * *' in handling situations similar to that facing the court below."

In Shaffman v. United States, 289 Fed. 370, 375, the Court said:

> "If the charge as a whole, upon a fair and reasonable interpretation, had, or was calculated to have,

> the effect of coercing the jury into rendering a compromise verdict, the judgment must be reversed."

In the case here the dynamite exploded before there was any reason to think that blasting was necessary. Even if the trial judge had given the charge after the jury had retired, the charge would have exceeded the permissible limits to which the Court might go in its endeavor to influence the jury towards the rendition of a verdict. The vice in the charge here was the Court's interference with the jury function. No matter when the charge was given, it gave the jury false notions of the validity and force of majority opinion; and it prejudiced the right of the appellant to a hung jury and a mistrial by tending to stifle the dissenting voices of minority jurors.

It is submitted that this charge to the jury is plain error affecting the substantial rights of appellant, and alone constitutes reversible error.

CONCLUSION

By virtue of the foregoing, the judgment of the District Court should be reversed with directions to enter a judgment of acquittal on all counts, or in the alternative remanded to the Juvenile Court.

Respectfully submitted,

Myron G. Ehrlich
Counsel for Appellant
(By appointment of this Court)

BRIEF FOR APPELLEE AND APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,935

MORRIS A. KENT, JR., APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOSEPH A. LOWTHER,
MAX FRESCOLN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

Appellant was a juvenile over sixteen years of age charged in the Juvenile Court with fourteen felonies, and the Juvenile Court had had custody of appellant for the two years preceding the crimes. Appellant allegedly informed the Juvenile Court that he had been mentally ill for some time. The Juvenile Court waived its jurisdiction over the offenses. Appellant was tried before a jury in the District Court.

1) Where appellant moved to dismiss the indictment, alleging that the investigation of the Juvenile Court prior to waiver of jurisdiction was inadequate, and where the District Court considered the motion in accordance with the approved procedure of *United States* v. *Anonymous*, 176 F.Supp. 325 (D.D.C. 1959), and where the Juvenile Court's waiver certificate stated waiver was made "after full investigation", did the District Court err in not concluding that there was not a full investigation on allegations that certain witnesses were not interviewed, that counsel was not permitted to see the "social records" of the Juvenile Court, and that waiver occurred without a period of mental observation of appellant?

2) Was not the District Court's decision not to convene itself as a Juvenile Court a proper exercise of its discretion?

3) At a hearing on competency to stand trial, where there was medical testimony that appellant was competent to stand trial, and no medical testimony to the contrary, did not the Judge have ample support for his conclusion that appellant was competent?

4) Where appellant's fingerprints were found in the apartment where the crimes occurred, could not the jury infer that he committed the crimes?

5) Was it plain error to use appellant's fingerprint cards in solving the crimes, and in illustrating the expert testimony to the jury?

6) Where the evidence on the issue of appellant's responsibility for the crimes was in conflict, did not the jury properly resolve the issue?

7) Did not the judge's instructions to the jury, approved by appellant's trial counsel, properly instruct the jury on the manner in which they should deliberate?

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TABLE OF CASES

* Cases chiefly relied upon are marked by asterisks.

Cases—Continued

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,935

MORRIS A. KENT, JR., APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

An indictment filed September 25, 1961, charged appellant with three counts of housebreaking (D. C. Code § 22-1801), three counts of robbery (D. C. Code § 22-2901), and two counts of rape (D. C. Code, § 22-2801) (J.A. 1-2). A jury trial began on March 14, 1963, and concluded March 27, 1963, when the jury returned its verdict of guilty as to the housebreaking and robbery counts, and not guilty by reason of insanity as to the rape counts (Tr. 1, 824). By Judgment and Commitment filed May 21, 1963, appellant was sentenced to consecutive prison terms of five to fifteen years for each housebreaking and robbery. The court recommended that St. Elizabeths Hospital be the place of confinement for appellant so long as he is suffering from a mental disease or disorder requiring his hospitalization, and adjudged that appellant is to be credited with all time served as a mental patient in a mental institution against the sentence imposed. (J.A. 29.) This appeal followed.

The Crimes of June 5, 1961

The complainant in the first three counts of the indictment was Juanita A. Echols (Tr. 28). In the early morning hours of June 5, 1961, she was awakened by a noise in her fifth-floor, efficiency apartment at 2153 California Street, Northwest (Tr. 29, 30, 32). She saw a shadow of a head above her television screen, and asked who was there. When she asked a second time, a figure leaped to the couch she was lying on and grabbed her by the shoulders (Tr. 32-33). She testified, "Well after he grabbed me he said, don't make a noise because I started screaming, and then he pulled me and said, all I came for is your money. Would you tell me where your billfold is? And I said, it is over on the dresser. So then he grabbed me, covers and all, plus the pillow that I had grabbed to keep in front of me, and he dragged me over to the dresser and I showed him where the billfold was." Her wallet contained twelve dollars in bills plus some change. (Tr. 34.) The intruder put the wallet in his pocket (Tr. 35). The complainant was so unnerved that she dropped the pillow, which she had used to keep from exposing that she was wearing only a pair of panties for a sleeping garment (Tr. 35, 30). The intruder stated, "well since I am here, I might as well get a little bit." He dragged her back to the couch and beat her about the face. (Tr. 35.) She began to scream, and he said that if she screamed again he would kill her. He then raped her. (Tr. 37-39.) When he had finished he left through the kitchen, which gave access to the fire escape through a combination window-door and a small porch (Tr. 29, 39).

The complainant called the police to whom she told what had happened (Tr. 39, 40, 63). A subsequent medical examination showed there was intact sperm in her vagina (Tr. 41, 56-57). The complainant's panties and a swatch of material from the couch had semen stains on them according to an expert witness (Tr. 43, 45, 60, 70-71, 73-74). The complainant could only identify the attacker as a Negro male (Tr. 37). Latent fingerprints were lifted from around

the window area of the combination window-door leading to the fire escape in Miss Echols' apartment (Tr. 46, 78-80). The window had been open approximately four inches from the bottom when Miss Echols had gone to bed, and there was a screen in the window (Tr. 30-31). One of the fingerprints found on the inside of the window ledge, was identical with the fingerprint of appellant's left-hand ring finger (Tr. 81-82).

The Crimes of June 12, 1961

In the fourth and fifth counts of the indictment, the complainant was Gloria Jean Palmer (Tr. 96). On June 12, 1961, she shared a two-bedroom apartment with Constance Walsh, apartment 303 at 1311 30th Street, Northwest (Tr. 98-99). At approximately 1:30 a.m. Miss Palmer was awakened by a hand over her mouth. She heard a male voice saying to her, " 'Don't scream. Don't move. Remember Miss Lockwood.' " She felt the intruder's other hand make a motion around her waist. He removed his hand from her mouth and she said, " 'Don't be silly. What do you want to do this for?' " He put his hand over her mouth again. Then when he removed his hand, Miss Palmer screamed for her roommate, " 'Connie, please come and help me. There is someone in my room.' " At this point Miss Palmer heard her roommate moving down the hallway, and the intruder left the room through the bedroom door. (Tr. 100-101, 107). The police were called (Tr. 103). After the police came, Miss Palmer discovered that her coin purse and her red wallet, containing 47 dollars, were missing from her purse. The purse was on the desk near the head of the bed, about a foot away from Miss Palmer when she had gone to bed. (Tr. 102-103.)

It was dark in Miss Palmer's bedroom, and she could only identify the intruder as a male (Tr. 101). After the police came, it was discovered the screen was out of the bathroom window, and there was a footprint in the bathtub. The bathroom window led directly onto the fire escape, with only about a nine-inch drop from the sill to

the fire escape floor. On the inside the bathtub was about three feet from the sill. When Miss Palmer had gone to bed the bathroom window was open, but it was covered by a screen on the outside. (Tr. 99, 100, 103-105, 110, 114.) The hallway of the apartment led from opposite the bathroom past Miss Palmer's bedroom to her roommate's bedroom. On both walls of the hallway were smudge prints about five feet off the ground, "and it looked like someone had felt his way down the passageway." (Tr. 99, 105-106, 110, 114.) The marks led to a closet door at one end of the hallway, where they ended. The surface of the walls was too porous for fingerprints to be lifted from it. On the closet door, however, fingerprint experts found latent prints identical to the four right fingerprints and the right thumbprint of appellant. (Tr. 114-116, 118-120, 122-126).

The Crimes of September 2, 1961

For the last three counts of the indictment, counts six, seven and eight, the complainant was Mary L. Murphy. On September 2, 1961, she was living in apartment 307 at 1717 Twentieth Street, Northwest. That night she was awakened when she felt someone's hand on her neck. She screamed. A male voice said, " 'If you are not quiet, I will kill you.' " She screamed and fought, and he again threatened to kill her. Just then she realized she was bleeding, and she saw on the bed the flatiron which had been on the kitchen window sill when she retired. So she lay quiet, and the intruder raped her. The intruder then left through the kitchen window which opened on the fire escape. Miss Murphy telephoned the resident manager who called the police. (Tr. 132, 133, 138-139, 141, 150.)

When the complainant had gone to bed there were no lights on in her apartment, but when she awoke with the intruder's hands around her throat, a light over the chest of drawers was burning. Her pocketbook containing her wallet which had twelve dollars in it was on the chest of drawers when she had gone to bed. It was about seven feet from her. Later, she discovered that her wallet was miss-

ing from her pocketbook. (Tr. 136-137, 143-144, 145, 149, 169-170.) She saw his face when it was close to hers. She identified the intruder as appellant. (Tr. 148, 149.)

When the police arrived the complainant had "blood scattered on her upper person," and there was blood on her nightgown, on the bed, and on the walls. She had severe contusions on her face, causing such swelling on the left side of her face that her left eye was completely closed; and cuts above and below her eye were bleeding. On the bed was a flatiron. (Tr. 147, 154, 161, 166, 167, 169, 170, 172, 175, 177.) A serologist testified that the complainant's nightgown had blood stains on it, and that the bed sheets had both blood stains and semen stains (Tr. 183, 186).

When Miss Murphy had gone to bed the front door of her apartment was locked. The kitchen window had been closed, but not locked because the sash was broken. On the window sill, besides the flat iron, there had been an empty coke bottle and a short, slightly opalescent, green bottle with a long stem which Miss Murphy used as a vase. The police discovered on the fire escape floor, about four feet down from the window sill, a three-tiered table with several coke bottles on it and a green, transparent vase, about 12 inches high and with a very narrow neck. The table was standing to the left of the window when faced from the outside. (Tr. 134, 136, 138, 142, 146, 190, 191.) Six latent fingerprints were lifted off the underside of the top tier of the table, which an expert identified as appellant's fingerprints (Tr. 194, 196, 198, 200, 201.) Appellant stipulated to the identification of his fingerprints (Tr. 198, 205-206, 214).

The Government rested its case. Appellant moved for a judgment of acquittal on each count. The court denied the motion. (Tr. 215-216).

The Evidence on the Question of Insanity

Appellant's trial counsel told the jury in his opening statement that the defense would not go to the thrust of the facts alleged in the indictment, but would be an insanity defense (Tr. 24). Appellant called fourteen witnesses;

and the testimony of two witnesses not present was stipulated. Four of the witnesses were lay witnesses; of the remaining ten witnesses, five were psychiatrists, four were psychologists, and one was trained as a psychiatric social worker; the stipulated testimony was that of psychiatrists. The Government called two psychiatrists.

The lay witnesses were appellant's mother, his two aunts, and his uncle (Tr. 217, 241, 603, 608). They testified that: appellant was from a broken home (Tr. 218); when he was two he saw his father fighting with his mother, and he asked his father to stop (Tr. 218); he feared his father (Tr. 219, 227, 228, 606, 609); he was an extremely nervous child and easily agitated, which meant he cried often (Tr. 603); once he smeared feces over himself (Tr. 605); his teachers at times could not get him to hear them (Tr. 220, 230); he had difficulty controlling his bowels up to the age of sixteen (Tr. 220, 609); he cut up live goldfish (Tr. 220); he killed his own puppy, and then was sorry (Tr. 221); he said voices sometimes told him to do things; so he could not help himself (Tr. 221, 225, 240); he sometimes talked to himself (Tr. 221, 243, 612); he sometimes would not hear things around him (Tr. 221, 608); he ran away from his older sister's girl schoolmates (Tr. 222, 239, 606, 611); when thirteen or fourteen years old he stole a purse from a parked automobile, and when the police took him into custody he asked his mother to " 'get a psychiatrist for me because I don't understand' " (Tr. 222-223); he slept poorly and had nightmares (Tr. 225, 604, 609); he broke things at home (Tr. 227); he was uncordial when his relatives visited him (Tr. 604); he completed eight years of schooling, and began his freshman year in high school (Tr. 230); he played on the freshman basketball team and enjoyed fishing (Tr. 238, 249); he was very ambitious, but would not follow through on assigned chores in his early teens (Tr. 243, 250, 613).

John Vincent Kavanagh, trained as a psychiatric social worker, testified that in the spring of 1961 he interviewed appellant for the Mackin High School authorities because appellant was not producing the work he should, he did

not pay as strict attention in class as he might, he laughed at inappropriate times, and he was not showing the vitality he should. Mr. Kavanagh could not make adequate contact with appellant who appeared unconcerned about his problem at school. Mr. Kavanagh concluded appellant needed psychiatric evaluation and help, and made recommendations to that end. (Tr. 437-442.)

The four psychologists all gave appellant standard psychological tests when they examined him. (Tr. 253-254, Dr. Beardsley; Tr. 377, Dr. Endicott; Tr. 445, Dr. Meltzer; Tr. 562, Dr. Levy). Their diagnostic impressions derived from their test results were generally that appellant had undifferentiated schizophrenia, a psychosis, at the time of the tests (Tr. 255; 379-380, 446, 467; 563). Three of the psychologists believed he had the mental illness at the time of the crime, and that the crimes were the product of the mental condition, or, but for the mental disease, the crimes would not have occurred, or, the mental illness proximately caused the crimes (Tr. 257; 380; 563). The other psychologist believed it "highly likely" that appellant had the mental illness at the time of the offenses and that they were proximately directed by the mental disease (Tr. 446, 447). Two of the psychologists said appellant had an average intelligence (Tr. 383; 449). One psychologist observed his memory quotient to be dull normal (Tr. 264). One testified his volitional controls were poor (Tr. 293), one said he would at times have difficulty controlling his impulses (Tr. 447). Dr. Beardsley said the mental illness was characterized by abnormal thoughts, difficulty with emotional control, and a deficit in common sense judgment (Tr. 255). Dr. Meltzer testified that one of the manifestations of appellant's disease was his concern and preoccupation with sexuality and his lack of certainty as to his sexual identity (Tr. 447). Dr. Levy testified appellant's crucial disturbance seemed to be of a sexual nature (Tr. 563). Dr. Beardsley described test responses indicating sexual disturbance (Tr. 272-273). (See Tr. 403, 409; 576.) Dr. Beardsley could not answer whether appellant knew what he was doing or whether he knew right from wrong when

he committed the crimes of June 5, 1961, as related in a hypothetical question. (Tr. 291-292). Dr. Meltzer had no opinion whether the progression of the same offenses indicated plan, design, scheme, and thinking on appellant's part (Tr. 468). He testified appellant could tell right from wrong at times (Tr. 469).

The five psychiatrists who appellant called at trial and the two psychiatrists whose testimony was stipulated examined appellant, and reached diagnoses of a psychosis, schizophrenia reaction, undifferentiated type (Tr. 297, 300, Dr. Platkin; Tr. 349, 350, 351, Dr. Novak; Tr. 472, 474, Dr. Dobbs; Tr. 519, 523, Dr. Johnson; Tr. 601, Dr. Hammond, Dr. Ryan; Tr. 634, 635, Dr. Goshen). Three said it was chronic (Tr. 300; 359; 474). All but one testified they had a history of appellant available in reaching their conclusion (Tr. 297, 347; 473; 518; 601). All but Dr. Johnson said the crimes were a "product" of the mental disease (Tr. 304; 352; 476; 601; 642). Dr. Johnson testified the disease caused the crimes (Tr. 528). Three of the doctors agreed that but for his mental condition, appellant would not have committed the crimes (Tr. 305; 602). Dr. Novak testified that it was possible appellant might commit the crime if there was no mental disease (Tr. 352), and Dr. Dobbs testified that "in all probability" appellant would not have committed the crimes but for the mental disease (Tr. 476).

On cross-examination, Dr. Novak, who first testified his diagnosis of appellant was firm on October 31, 1961, acknowledged that in a letter dated December 19, 1961, to the clerk of the District Court, he wrote that while he believed appellant's mental condition to be psychotic, he was unable to arrive at a definite opinion on the matter (Tr. 356, 357). There was testimony that the mental illness impaired volitional controls (Tr. 302, 303; 353; 525; 602). Dr. Platkin and Dr. Dobbs testified on cross-examination that when they reached their diagnostic conclusion, they were aware of the St. Elizabeths admission notes, made by a doctor, that appellant was orientated as to time, place, and person, that appellant talked rationally and acted without unusual mannerisms or behavior and that there was "No

evidence of blocking" (Tr. 316-319, 506). Dr. Platkin suspected when he made his diagnosis that appellant did not hear voices[1] (Tr. 312).

On cross-examination four defense doctors agreed that assuming the facts of a hypothetical question based on the crimes of June 5, 1961, planning by appellant was indicated, although Dr. Goshen called it an irrational plan (Tr. 332; 364; 487; 651). While Dr. Platkin said the facts indicated appellant knew what he was doing (Tr. 332), Dr. Novak said he could not say because he "didn't know what his mental condition was at the time" (Tr. 365); Dr. Goshen could not answer (Tr. 649), but said appellant had the capacity to refrain from entering (Tr. 663). Dr. Platkin acknowledged that the facts of the hypothetical question suggested appellant entered the apartment to get money (Tr. 333) and Dr. Dobbs seemed to agree, having thought the robbery was incidental to the rape (Tr. 486). Dr. Johnson believed appellant had no conscious reason to steal when he entered (Tr. 550), and Dr. Goshen believed appellant's asking about money did not show motive (Tr. 650). Dr. Platkin believed that when the victim dropped the pillow covering her, appellant's passions were aroused, and that while he knew right from wrong when he entered the apartment and while robbing, he did not once his passion was aroused. (Tr. 334, 336, 337). Dr. Dobbs believed appellant was aware that what he did was wrong, and that he fled to avoid apprehension (Tr. 488).

Dr. Dobbs testified on cross-examination that the facts as related in a hypothetical question regarding the crimes of June 12, 1961, indicated that when appellant entered the apartment, at least part of his motive was to get money (Tr. 489). Dr. Dobbs had testified on direct examination that appellant's craving for sexual relief was more and more intense that summer of 1961 (Tr. 475). She acknowledged on cross-examination that there was no obvious

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[1] Dr. Cavanagh, who the government called on the insanity question, had a different explanation for the voices (Tr. 712).

sexual signifiance about the alleged stealing as supposed in the hypothetical questions regarding the June 4th and June 12th crimes (Tr. 492). She testified that while stealing may have sexual significance in some patients she could draw no such conclusion regarding appellant (Tr. 491, 492). She said, "The causation with regard to the robberies is obviously less clear than it is with regard to the alleged sexual offenses themselves . . ." (Tr. 492). Dr. Dobbs believed the motivation to enter the apartments was to rape, not to rob (Tr. 513). She testified, however, that while she was unable to state the robberies had no connection with the disease, she was unable to state what the motivation for the robberies was (Tr. 510). Dr. Platkin testified that from the hypothetical question concerning the June 12th crimes it appeared appellant entered the apartment to get money (Tr. 338), while Dr. Goshen doubted that was his motive (Tr. 663), Dr. Johnson ruled it out as a motive (Tr. 556), and Dr. Novak said he was not free to make judgments about his behavior (Tr. 367). Dr. Platkin and Dr. Dobbs agreed that appellant's flight on June 12, 1961, indicated he knew what he had done was wrong (Tr. 339; 506). They believed the same conclusion could be drawn from flight after the crimes of September 2, 1961 (Tr. 341; 506); and Dr. Dobbs said those facts indicated plan, purpose, and scheme on appellant's part (Tr. 501).

As rebuttal witnesses the Government called two psychiatrists (Tr. 669, Dr. Owens; Tr. 689, Dr. Cavanagh). Dr. Owens examined appellant with a knowledge of his history and diagnosed appellant as having the mental disease of schizophrenic reaction, chronic undifferentiated type (Tr. 672). He believed it was not a severe case (Tr. 673). On the assumed facts of hypothetical questions about the crimes of June 5, 1961, June 12, 1961, and September 2, 1961, the doctor concluded that the schizophrenia probably did not cause the robberies (Tr. 674, 675), and he had no opinion about the housebreakings or rapes on June 5th and September 2nd (Tr. 674, 676). Later, on cross-examination, he said that at the time of his original diagnosis he had no opinion on the productivity question as to the house-

breakings, but on the assumed facts of the hypothetical questions he did express an opinion (Tr. 682). Dr. Owens had earlier explained that he saw in appellant's symptoms considerable sexual preoccupation, so if the primary motivation for a crime was the sexual desire, there would be productivity (Tr. 679). Dr. Owens said if it appeared from the assumed facts that the primary motivation for entering the apartments in the crimes charged was to rob, that would be significant (Tr. 679). Dr. Owens said it appeared from the assumed facts that the primary motivation for entering the apartments was robbery, eliminating connection between the robberies and housebreakings and the mental illness (Tr. 680, 688).

The second doctor the Government called, Dr. Cavanagh, testified that with the hospital records available to him, he examined appellant, and concluded he had schizoid tendencies but was not psychotic (Tr. 690, 691, 702). Dr. Cavanagh did not think appellant's schizoid personality amounted to a sociopathic personality disorder (Tr. 704, 705), and represented a way of behavior, not sickness (Tr. 706). Dr. Cavanagh found no evidence of schizophrenia, either incipient or pre-psychotic (Tr. 718).

The Procedural Development of the Case Between Arrest and Trial

Appellant was arrested on September 5, 1961 (See Tr. 179, 198).[2] Appellant was 16 years old at the time of his arrest and had been under probation in the Juvenile Court for the preceding two years (Tr. 621-627; Transcript of Hearing of February 8, 1963, p. 16). On September 12, 1961, the Juvenile Court signed its waiver of jurisdiction over fourteen felonies charged against appellant, and ordered appellant held for trial for the offenses under the regular procedure of the United States District Court. The

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[2] Part of appellant's Statement of The Case is not supported by the record. (Br. 3, 4, 5.) The record nowhere reveals the details of appellant's arrest, or what procedure was followed concerning his custody between arrest and Juvenile Court waiver.

order recited the waiver was made "after full investigation". (J.A. 21-22.) The Grand Jury indicted appellant for eight offenses by an indictment filed September 25, 1961 (J.A. 1-2).

Appellant moved in October for mental observation in D. C. General Hospital (J.A. 4-6). The motion was granted October 17, 1961 (J.A. 17).

Appellant's Motion to Dismiss the Indictment was filed on November 16, 1961 (J.A. 7). In the motion appellant contested the waiver of jurisdiction by the Juvenile Court on the ground the investigation prior to waiver was not "full", and that the order of waiver was entered in violation of D.C. Code § 11-914, the due process clause of the Fifth Amendment and the Sixth Amendment right to effective assistance of counsel (J.A. 7). The appellant asked that the case be remanded to the Juvenile Court unless the District Court wished to convene itself as a Juvenile Court in the case (J.A. 14).

By a letter dated December 20, 1961, the Chief Psychiatrist of the District of Columbia General Hospital reported to the District Court that appellant was incompetent to stand trial and participate in his own defense. The Government opposed the report. (J.A. 17.) On January 8, 1962, the District Court ordered further examinations of appellant at St. Elizabeths Hospital (Transcript of hearing of January 8, 1963, p. 6). On April 6, 1962, the letter of the Superintendent of St. Elizabeths Hospital was filed certifying appellant was competent for trial (Transcript of Proceedings of March 7, 1963, p. 4; See docket entries). Appellant then moved for a hearing to determine his competency for trial (J.A. 18).

The trial date had to be advanced several times because appellant had attacked the waiver of jurisdiction of the Juvenile Court by direct appeal to the District of Columbia Court of Appeals, and by writ of habeas corpus in the District Court, and he was appealing adverse decisions to this Court (Transcript of hearings 8-9, 10, 13). This Court rendered its opinions in those appeals on January 22, 1963. *Kent* v. *Reid*, —— U.S. App. D.C. ——, 316 F.2d 331 (1963).

On February 8, 1963, the District Court, with the Juvenile Court records of appellant before it, denied appellant's motion to dismiss the indictment (Transcript of hearings 16, 17-19, 21; and see receipt of Deputy Clerk Rumsey of the District Court for appellant's records in Juvenile Court file 87913, part of the record). The District Court denied the motion to convene itself as a Juvenile Court (Transcript of hearings 16, 21).

A hearing on appellant's competency to stand trial was held March 7, 1963 (J.A. 3). The judge had before him an affidavit of Dr. Johnson who averred he had a question in his mind whether appellant was competent to stand trial. Dr. Owens testified he examined appellant that day, and that appellant was completely aware of the charges and their nature. Appellant was oriented, his memory was good, and he knew the defenses available to him. It was Dr. Owens' impression that appellant knew the nature of the charges, and could properly assist counsel in his defense. Dr. Platkin had the same opinions as Dr. Owens. Appellant's counsel testified he was unable effectively to communicate with appellant. The judge found appellant competent to stand trial. (Transcript of proceedings of March 7, 1963, pp. 3-7, 10, 12-13, 15-16.)

STATUTES AND RULES INVOLVED

Title 22, D. C. Code, § 1801, provides in pertinent part:

> Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, * * * with intent * * * to commit any criminal offense, shall be imprisoned for not more than fifteen years.

Title 22, D. C. Code, § 2801, provides in pertinent part:

> Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years. . . .

Title 22, D. C. Code, § 2901, provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 11, D. C. Code, § 914 provides:

> If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment, the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult; or such other court may exercise the powers conferred upon the juvenile court in this subchapter in conducting and disposing of such cases.

Title 11, D. C. Code, § 929 provides in pertinent part:

> (a) The court shall maintain records of all cases brought before the court. Such records shall be withheld from indiscriminate public inspection but shall be open to inspection only by respondents, their parents or guardians and their duly authorized attorneys, and by any institution or agency to which a child may have been committed pursuant to section 11-915. Such records may, pursuant to rule of court or special order of the court, be inspected by other interested persons, institutions and agencies. As used in this subsection, the word "records" includes notices filed with the court by arresting officers pursuant to section 11-912, the court docket and entries therein, the petitions, complaints, informations, motions and other papers filed

in any case, transcripts of testimony taken in any case tried by the court and findings, verdicts, judgments, orders and decrees, and other writings filed in proceedings before the court, other than social records.

(b) The records made by officers of the court pursuant to sections 11-908 and 11-924, referred to in this section as social records, shall be withheld from indiscriminate public inspection, except that such records or parts thereof shall be made available by rule of court or special order of court to such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child, and to any court before which any such child may appear. The judge may also provide by rule or special order that any such person or agency may make or receive copies of such records or parts thereof. No person, agency or institution which has received records or information under this section may publish or use them for any purpose other than that for which they were received.

(c) It shall be unlawful, except for purposes for which records, parts thereof, or information therefrom have been released pursuant to section 11-929 or except for purposes thereafter permitted by special order of court, and in accordance with any applicable rules of court, for any person or persons to disclose, receive, or make use of, or authorize, knowingly permit, participate in, or acquiesce in the use of any information concerning any juvenile before the court, directly or indirectly derived from the records, papers, files, or communications of the court, or acquired in the course of the performance of official duties.

Rule 30 Federal Rules of Criminal Procedure provides in pertinent part:

> * * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict,

stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

SUMMARY OF ARGUMENT

The District Court gave proper consideration to appellant's motion to dismiss the indictment following the procedures of *United States* v. *Anonymous*, 176 F.Supp. 325 (D.D.C. 1956). The presumption of regularity of the Juvenile Court waiver after "full investigation" was not overcome by appellant's pleadings. The matters appellant alleged as indicative that the investigation was inadequate had little weight in this case where appellant faced many serious charges, and the Juvenile Court had had custody of appellant over the preceding two years, and would know of his home life and school background, and would know whether its *parents patriae* relationship could effectively be exercised over him. The District Court's decision not to try appellant was a proper exercise of discretion.

The medical evidence supported the judge's conclusion that appellant was competent for trial. The evidence of the presence of appellant's fingerprints in the apartments where the crimes occurred was sufficient for the jury to infer it was appellant who committed the crimes. Appellant did not object to having a fingerprint card with his fingerprints on it shown to the jury. There is no privilege against such use of the fingerprint card. The evidence on the question of appellant's insanity and its relation to the crimes was in conflict, thereby presenting an issue for the jury. The jury deliberated under proper instructions which appellant's counsel approved.

ARGUMENT

I. The Court Properly Denied Appellant's Motion to Dismiss the Indictment

(See Transcript of hearings 16-21.)

With the Order of the Juvenile Court waiving its jurisdiction, and that court's records concerning appellant before the District Court judge, he was able to rule, without need of a hearing, and deny appellant's motion to dismiss the indictment. The procedure the District Court judge followed was precisely that of *United States* v. *Anonymous*, 176 F. Supp. 325 (D.D.C. 1959), a procedure this Court has approved. *Kent* v. *Reid*, —— U.S. App. D.C. ——, ——, 316 F.2d 331, 334 (1963); *Green* v. *United States*, 113 U.S. App. D.C. 348, 351, 308 F.2d 303, 306 (1962). It constituted the proceedings necessary to determine whether the investigation of the Juvenile Court had been full.

The "full investigation" required in the Juvenile Court prior to waiver is "such investigation as is needed to satisfy that court as to what action should be taken on the question of waiver. See *United States* v. *Dickerson*, [106 U.S. App. D.C. 221, 225, 271 F.2d 487, 491 (1959)]; *Pee* v. *United States*, 107 U.S. App. D.C. 47, 274 F.2d 556 (1959); *Briggs* v. *United States*, 96 U.S. App. D.C. 392, 226 F.2d 350 (1955); *United States* v. *Stevenson*, 170 F. Supp. 315 (D.D.C. 1959)." *Wilhite* v. *United States*, 108 U.S. App. D.C. 279, 280, 281 F.2d 642, 243 (1960). It calls for "an inquiry not only into the facts of the alleged offense but also into whether the *parens patriae* plan of procedure is desirable and proper in the particular case." *Pee* v. *United States*, *supra*, 107 U.S. App. D.C. at 50. It prevents *routine* waivers "for the purpose of easing the docket" or in "certain classes of alleged crimes." *Green* v. *United States*, *supra*, 113 U.S. App. D.C. at 350. Though it may include informal hearings, no formal hearing is necessary. *Wilhite* v. *United States*, *supra*, 108 U.S. App. D.C. at 180; *United States* v. *Dickerson*, *supra*, 106 U.S. App. D.C. at 225. The important thing is that the judge be fully advised of rele-

vant facts so he may intelligently exercise his discretion. *United States* v. *Stevenson*, *supra*, at 318.

The Juvenile Court judge's decision to waive "after full investigation", a discretionary act, is presumed to be regular. *Wilhite* v. *United States*, *supra*, 108 U.S. App. D.C. at 280; *United States* v. *Stevenson*, *supra*, at 319. Appellant did not show that the Juvenile Court judge's decision to waive was arbitrary and capricious. The matters appellant alleged in his motion did not require the District Court judge to conclude that the investigation in Juvenile Court was less than "full."

When considering the pertinent factors in determining whether to waive, the Juvenile Court did not need to have an independent psychiatric examination made, nor specially interview the appellant's mother and his high school principal as appellant claimed. With the information the Juvenile Court had it was able to apply the criteria of its Policy Memorandum No. 7. (See Appendix.) Appellant's own affidavits furnished the Juvenile Court with the knowledge of the possibility of mental illness in the appellant. The Juvenile Court's previous custody of appellant over a two-year period furnished the court with the knowledge of the home situation of appellant. If there were new details pertinent to the problem confronting the court at that time, appellant was free to bring such matters to the court's attention by means of affidavits. In considering all the factors of the Policy Memorandum, the court had ample basis for a conclusion that the Juvenile Court would not be the proper guardian of appellant's future.[3] While the

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[3] When determining whether or not a case is an appropriate one for waiver, the Juvenile Court appropriately must consider all relevant factors which fall within the eight "determining factors" listed in the Juvenile Court Policy Memorandum No. 7, not just the factors appellant considers to be significant. This Court's proscription against automatic waiver in serious cases without regard to other relevant factors, does not mean the nature of the offense is not to be considered at all. Indeed, for the Juvenile Court to know whether its procedures should be used and to know what sort of a

court had been exercising the *parens patriae* relationship, appellant committed a large number of serious offenses, several of them capital crimes. The court could see that if appellant did suffer from a mental illness which caused some or all of the offenses, the Juvenile Court had great limitations for handling his problems. It would have to commit him to St. Elizabeths Hospital where there could be little nurturing of a *parens patriae* relationship, unlike

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juvenile they are dealing with, the nature of the offense is most pertinent.

As part of a full investigation, the Juvenile Court must know the extent of a juvenile's involvement in crime. Police questioning is therefore necessary. Such questioning in appellant's case does not mean he was deprived of liberty without due process of law. At all times appellant was protected from the possibility that the Juvenile Court procedure would serve as an adjunct of the criminal process. *Harling* v. *United States*, 111 U.S. App. D.C. 174, 295 F.2d 161 (1961).

Appellant makes an unsupported claim that information gained from appellant's confession was used to cross-examine defense witnesses (Br. 65). There is absolutely nothing in the record to indicate this. The hypothetical questions of Government counsel contained only facts which were proved, or reasonably inferred from the evidence. *Horton* v. *United States*, 15 App. D.C. 310, 325 (1899); *Kirsch* v. *United States*, 174 F.2d 595, 601 (8th Cir. 1949). The jury could certainly infer from the evidence that the robberies all preceded the rapes.

Appellant's claim that appellant's fingerprinting was the "direct result of the lawlessness of the police in the treatment of appellant" (Br. 66) is not only rhetorical, but has no basis in the record. Though the record does not show when appellant's fingerprints were taken after arrest, appellant was in lawful custody when they were taken, and certainly the provisions of D.C. Code § 11-912 governing what is to be done when a child is taken into custody do not preclude fingerprinting a juvenile. It is a normal part of routine identification processes. *Smith* v. *United States*, No. 17466, decided September 26, 1963, S. O. 8; *Bynum* v. *United States*,170 U.S. App. D.C. 109, 274 F.2d 767 (1960).

The fingerprints taken from appellant when he was arrested were not privileged from use for fingerprint comparison in the criminal investigation merely because he was a juvenile. Neither logic nor

when the treatment of a juvenile can be conducted at a facility peculiarly within the Juvenile Court's competence, such as the training school, a foster home, etc. Thus, the possibility of mental illness in a juvenile offender whose crimes are extremely serious is indeed an appropriate factor to consider on the waiver question, but in the instant case the factor when considered would not necessarily militate against waiver by the Juvenile Court.

Appellant's claim that his counsel was entitled to inspect the social records of the Juvenile Court prior to its decision to waive or retain jurisdiction is without support. The "full investigation" required by the statute is "an administrative process within the Juvenile Court." Congress did not give appellant the right to be heard concerning waiver. *Kent* v. *Reid*, *supra*, 316 F.2d at 333; *Wilhite* v. *United States*, *supra*, 108 U.S. App. D.C. at 280; *United States* v. *Stevenson*, *supra*, at 318. On that basis alone appellant's counsel would not be entitled to the social records.

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legal authority provides support for the contrary proposition. The legislation established in Juvenile Court was never intended to shield children from the possibility of having their crimes discovered.

It was not improper for a fingerprint card taken when appellant was arrested to be used for purposes of explaining the fingerprint comparison to the jury. The provisions of D.C. Code § 11-929(c) do not prohibit such use of a juvenile's fingerprints. His fingerprints are neither part of what is meant by the social records (D.C. Code §§ 11-908, 11-924), nor part of the other records as defined in D.C. Code § 11-929(a). Nor may *Harling* v. *United States*, *supra*, be correctly interpreted to mean that such fingerprint comparison may not be made in a District Court trial of a juvenile, for using such evidence does not make the juvenile proceedings an adjunct of the adult criminal process. And assuming *arguendo* that use of that particular fingerprint card was questionable, use of a card made after the decision of the Juvenile Court to waive certainly could not be questioned. So it could not be plain error to make the fingerprint comparison as it was done in this case. Appellant saw no defect at trial in the fingerprint comparison, and even stipulated to the identification in the portion of the Government's case proving the crimes of September 5, 1961 (Tr. 198, 205-206, 214).

Furthermore, the statute specifies "*duly authorized attorneys*" as among those permitted to inspect the records *other than social records* (D.C. Code § 11-929(a)), but allows access to social records, made available by court rule or order, only to "such persons, governmental and private agencies, and institutions as have a legitimate interest in the protection, welfare, treatment, and rehabilitation of the child, and to any court before which any such child may appear" (D.C. Code § 11-929(b)). Congress clearly knew how to say that it wanted juveniles and their counsel to have access to records; and Congress did not authorize such availability of the social records in D.C. Code § 11-929(a). The legislative history of D.C. Code § 11-929 shows Congress amended the statute to its present form, not to give the juvenile or his legal counsel access to the social records, but to overcome an interpretation of the Juvenile Court judge that the social records could be made available only to the staff of the court, having "the effect of withholding information from certain agencies, which is needed to properly carry on their work." S. Rep. No. 1195, 82d Cong., 2d Sess. (1952), 2-3. See also H. R. Rep. No. 1937, 82d Cong., 2d Sess. (1952), 1-2; 98 Cong. Rec. 5975.

The decision of the District Court judge not to treat appellant as a juvenile was a proper exercise of his discretion.[4] The judge must have given great weight to the decision of the Juvenile Court to waive its jurisdiction, knowing the expertise that court has in evaluating juveniles and in determining whether its facilities can be appropriately applied to them. In addition the same factors regarding the nature of the offenses charged and the mental status of appellant,

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[4] The statute states the District Court "may exercise the powers conferred upon the juvenile court . . . in conducting and disposing of such cases [where the juvenile court has waived jurisdiction]." When exercising his discretion the judge need not make a formal choice between the procedures to follow, for its choice may be implicit in the way it proceeds. *Pee* v. *United States, supra,* 107 U.S. App. D.C. at 51.

provided ample basis for the judge to deny appellant's request he be treated as a juvenile.[5]

II. There Was Ample Evidence to Support the Finding Appellant Was Competent to Stand Trial

(See Transcript of Proceedings of March 7, 1963, pp. 3-7, 10, 12-13, 15-16.)

Appellant brought forward no medical evidence at the hearing that he was not competent to stand trial and to assist in his defense. His attorney testified he was unable to communicate effectively with appellant, and an affidavit of Dr. Johnson averred he had some question as to appellant's competence; but weighed against the testimony of Dr. Platkin and Dr. Owens that appellant was competent to stand trial, that evidence did not require the judge to conclude appellant was incompetent. On this record, appellant's claim that there was no fair determination of the competency question is frivolous. The judge had to be satisfied that appellant was competent. *Gunther* v. *United States*, 94 U.S. App. D.C. 243, 245, 215 F.2d 493, 496 (1954). The evidence amply supported the judge's assurance that the trial could fairly proceed against appellant.

III. The Evidence Was Sufficient to Show Appellant Committed the Crimes

(See Tr. 29-39, 46, 78-82; 96-107, 114-116, 118-120, 122-126; 132-134, 136-139, 142-146, 148-149, 160, 190, 191, 198, 205-206, 214.)

Appellant's fingerprints were found in the apartments where the crimes occurred. In the case of June 5, 1961,

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[5] Appellant did not ask for a hearing on the motion, so he may not complain that the judge's decision was summary. He does not claim he was unable to inform the court of any pertinent facts. What the court knew of appellant's history when the motion was first denied is not clear (Tr. 16), but when the court again denied the motion (Tr. 21) it had the records of the Juvenile Court before it (Tr. 17).

his fingerprint was on the windowsill of the combination window-door through which the intruder entered and left the apartment (See Counterstatement 2-3). In the case of the crimes of June 12, 1961, his fingerprints were in the hallway at the end of a trail of smudges which had not been present prior to the crimes (See Counterstatement 4). In the case of the crimes of September 2, 1961, the victim identified appellant as the man who raped her, and his fingerprints were found on a table on the fire escape landing right outside the window through which he gained access to the apartment and through which he left (See Counterstatement 5). Appellant gave no explanation as to how the fingerprints got into the apartments. There certainly was no apparent innocent explanation of them. The jury could justifiably infer from the fingerprint evidence that appellant committed the crimes. *Curley* v. *United States*, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232 (1947), *cert. denied*, 331 U.S. 837; *United States* v. *Pisano*, 193 F.2d 361 (7th Cir. 1951); *United States* v. *Iacullo*, 225 F.2d 458 (7th Cir. 1955); compare *Bynum* v. *United States*, *supra*, where the conviction was based on a fingerprint found at the scene of the crime.

IV. The Evidence on the Issue of Appellant's Responsibility for the Crimes Presented a Question for the Jury

255, 257, 264, 272-273, 291-293; 297, 300, 302-304, 312, 316-319, 332-339, 341; 347, 349-353, 356, 357, 359, 364, 365, 367; 379-380, 383, 403, 409; 446, 447, 449, 467-469; 472-476, 486, 487-492, 501, 506, 510, 513; 518-519, 523, 525, 528, 550, 556; 563, 576; 601-602; 634, 635, 642, 649, 650-651, 663; 669, 672-688; 690-718.

The evidence on the issue of insanity was in conflict. The lay testimony gave the jury some history of appellant's behavior (See Counterstatement 6). Some of the expert witnesses testified that appellant's crimes were a result of mental illness, some testified they were not (See Counterstatement 7, 8, 10-11). The defense witnesses were cross-

examined extensively and revealed considerable points of conflict and disagreement among themselves (See Counterstatement 7-10). Dr. Dobbs modified her conclusion that all of appellant's crimes were a product of the mental illness she found in appellant (See Counterstatement 9-10). Her testimony was ultimately more in accord with that of Dr. Owens who testified for the Government that the mental illness he found in appellant was sexually oriented, and probably did not cause the housebreaking and robberies (See Counterstatement 10-11). The testimony of the psychologists appellant called added further weight to Dr. Owens' conclusion (See Counterstatement 7). One psychiatrist testified that appellant had no mental illness at all (See Counterstatement 11). With the evidence on the issue of insanity in such conflict, the jury was properly required to judge the credibility of the witnesses and resolve the issue of criminal responsibility in this case. *McDonald* v. *United States*, 114 U.S. App. D.C. 120, 312 F.2d 847 (1962); *Hawkins* v. *United States*, 114 U.S. App. D.C. 44, 310 F.2d 849 (1962); *Williams* v. *United States*, 114 U.S. App. D.C. 135, 312 F.2d 862, *cert. denied* 374 U.S. 841 (1962); *Hightower* v. *United States*, No. 17376, decided October 22, 1963; *Jones* v. *United States*, 613 U.S. App. D.C. 256, 307 F.2d 397 (1962).

V. The Jury Decided the Case Under Proper Instructions

At trial, counsel for appellant told the judge:

> * * * I believe that the Court's charge was eminently fair as to all the defendant's requested instructions, and I think the Court's charge in toto realistically and accurately stated the law in the District of Columbia (Tr. 819).

Now appellant complains of the following portion of the charge, despite lack of objection below:

> You have before you all of the evidence which the Government and the defendant can offer in this case. The verdict which you return to the courtroom should

represent your individual opinions. In other words, each of you must arrive at your own verdict; but this does not mean that your views, your opinions may not be changed by conference in the jury room. The object of the jury system is to secure a unanimous verdict by comparison of views and by arguments and by discussion among the jurors themselves. Each of you should listen with deference to the arguments of the other jurors and with a distrust of your own judgment if you find that a large majority of the jurors take a different view of the case than that which you yourself take.

None of you should go into the jury room with a blind determination that the verdict should represent your opinion of the case at the moment you leave the courtroom, or that you should close your ears to the arguments of other jurors who are equally honest and equally intelligent with yourself. Accordingly, although the verdict must be the verdict of each of you individually and not a mere acquiescence in the conclusion of your fellow jurors, the Court instructs you that you should examine the issues submitted with candor and with a proper regard and deference to the opinions of each other. It is your duty to decide this case if you can conscientiously do so. You should listen to each other's arguments with a disposition to be convinced.

If in any question put to you for a vote by your foreman, any one if you should find that you are a very pronounced minority on any question, you should appraise your situation. You should ask yourself, Why did this evidence make such an impression on me when it didn't make a similar impression on a great number of other jurors who are equally honest and equally intelligent with myself?

I repeat, your verdict must be a unanimous one. It must represent your individual view of the case, but you should not solidfy your judgment in the case until

> you have had an opportunity to listen with an open mind to the discussion of all of the other jurors in the jury room. (Tr. 815-816.)

In order to prevail appellant must show the instruction was plain error. Rule 30, Federal Rules of Criminal Procedure; *Jones* v. *United States*, 113 U.S. App. D.C. 233, 307 F.2d 190 (1962); Rule 52(b), Federal Rules of Criminal Procedure. As the Supreme Court has ruled that it is not error to instruct the jury in the manner the judge did in the instant case, appellant certainly cannot show plain error. *Allen* v. *United States*, 164 U.S. 492, 501 (1896). When a charge in the language of *Allen* v. *United States*, *supra*, is given before the jury retires to deliberate, there can be no coercive effect, which is the alleged vice in the charge. *Holdridge* v. *United States*, 282 F.2d 302, 311 (8th Cir. 1960); *Janko* v. *United States*, 281 F.2d 156, 167 (8th Cir. 1960), *reversed on other grounds*, 366 U.S. 716; *Nick* v. *United States*, 122 F.2d 660, 674 (8th Cir. 1941), *cert. denied*, 314 U.S. 687. The judge's instructing the jury how to approach its deliberations was especially appropriate in this case in view of the length of the trial, the seriousness of the charges, and the complexity of the defense.

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of the District Court be affirmed

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOSEPH A. LOWTHER,
MAX FRESCOLN,
Assistant United States Attorneys.

APPENDIX

November 30, 1959

Juvenile Court of the District of Columbia
Policy Memorandum No. 7

To: All Staff
From: Judge Ketcham
Subject: Waiver of Jurisdiction

The authority of the Judge of the Juvenile Court of the District of Columbia to waive or transfer jurisdiction to the U. S. District Court for the District of Columbia is contained in the Juvenile Court Act (§ 11-914 D. C. Code, 1951 Ed.). This section permits the Judge to waive jurisdiction "after full investigation" in the case of any child "sixteen years of age or older [who is] charged with an offense which would amount to a felony in the case of an adult, or any child charged with an offense which if committed by an adult is punishable by death or life imprisonment".

The statute sets forth no specific standards for the exercise of this important discretionary act, but leaves the formulation of such criteria to the Judge. A knowledge of the Judge's criteria is important to the child, his parents, his attorney, to the judges of the U. S. District Court for the District of Columbia, to the United States Attorney and his assistants, and to the Metropolitan Police Department, as well as to the staff of this court, especially the Juvenile Intake Section.

Therefore, the Judge has consulted with the Chief Judge and other judges of the U. S. District Court for the District of Columbia, with the United States Attorney, with representatives of the Bar, and with other groups concerned and has formulated the following criteria and principles concerning waiver of jurisdiction which are consistent with the basic aims and purpose of the Juvenile Court Act.

An offense falling within the statutory limitations (set forth above) will be waived if it has prosecutive merit and

if it is heinous or of an aggravated character, or—even though less serious—if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under Juvenile Court procedures, or if the public needs the protection afforded by such action.

The determinative factors which will be considered by the Judge in deciding whether the Juvenile Court's jurisdiction over such offenses will be waived are the following:

1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
2. Whether the alleged offense was committed in an aggressive, violent, premediated or willful manner.
3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
5. The desirability of trial and disposition of the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U. S. District Court for the District of Columbia.
6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and pattern of living.
7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts in other jurisdictions, prior periods of probation to this Court, or prior commitments to juvenile institutions.
8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of

the juvenile (if he is found to have committed the alleged offense) by the use of procedures, services and facilities currently available to the Juvenile Court.

It will be the responsibility of any officer of the Court's staff assigned to make the investigation of any complaint in which waiver of jurisdiction is being considered to develop fully all available information which may bear upon the criteria and factors set forth above. Although not all such factors will be involved in an individual case, the Judge will consider the relevant factors in a specific case before reaching a conclusion to waive juvenile jurisdiction and transfer the case to the U. S. District Court for the District of Columbia for trial under the adult procedures of that Court.

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